

TRANSCRIPT OF PROCEEDINGS

MEETING ON PARCEL SHIPPING)
SCALES WORKSHOP)
)

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MEETING ON PARCEL SHIPPING)
SCALES WORKSHOP)
)

Lecture Room A
Building 101
National Institute of
Standards & Technology
100 Bureau Drive
Gaithersburg, Maryland

Thursday,
June 3, 1999

The parties met, pursuant to notice, at 9:00 a.m.

BEFORE: Thomas Coleman
National Institute of Standards &
Technology

APPEARANCES:

Gilbert M. Ugiansky
NIST

Aves Thompson
NCWM Inc.

Jim Moriarty
Fleschman and Walsh, L.L.P.

James Dann
Department of Transportation

Steve Malone
NCWM Inc.

Daryl E. Tonini
Scale Manufacturers Association

C.V. Duke Cotsoradis
Kansas

APPEARANCES:

Vicky Dempsey
Ohio

Michael Rubin
Tina Butcher
NIST

Mr. Warnloff

Mr. Anderson

Alan Humphrey
New Jersey

Mr. Carroll

David Quinn
Fairbanks Scale

Leonard Hubert
Ohio

Gary West
New Mexico

1 P R O C E E D I N G S

2 MR. COLEMAN: I guess we're ready to begin. Good
3 morning. We'll have to wait for the gentleman from Kansas
4 to be seated. Good morning. My name is Tom Coleman. I'd
5 like to welcome you to today's workshop. Today's workshop
6 and tomorrow's workshop are sponsored by the National
7 Conference on Weights & Measures, Inc. and NIST, and I think
8 we have a lot of very important issues that we can decide
9 their fate, maybe, in the next couple of days, at least make
10 reasonable decisions, because we are all reasonable people.
11 So, there should be some way to work out what we need to get
12 done.

13 I have a lot of things here, a lot of logistical
14 things. As you can tell, we have a court reporter present.
15 She gave me a note that says, would you please come up to
16 the microphones and identify yourself, where you're from and
17 your name, before you speak. One of the main objectives
18 today is to let everyone have an opportunity to say what
19 they need to say on these particular issues.

20 I'd like to refer to the agenda that I hope you
21 have. If you don't, I'll get you a copy. They were
22 available for you at the registration desk. As you can see,
23 we have a very busy schedule, but we do have time -- do you
24 have one, Wes? Mr. Diggs has to have personal care. That
25 will be all right. I will get you one, Wes.

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1 But, as you can see, we have a very full schedule
2 and we have all the appropriate people here to make the
3 right decisions. So, I think it's going to be a very
4 educational and informative day and I think a lot of good
5 things can happen because of this workshop.

6 A couple of the very important things that I need
7 to mention to you, obviously on breaks, a lot of people have
8 asked me about restrooms. There is a problem with
9 construction here in this part of the building. So, right
10 behind the registration desk, there is a set of restrooms,
11 just as you came in the main door. And, you go back, go out
12 this door to the left and to the left again, and then you
13 get to the courtyard area and there is a set of restrooms
14 down right across, in the hallway across, in the entrance to
15 the cafeteria. And, we will be taking breaks, and so the
16 cafeteria, I'm sure, is a place that you'll need to know
17 about also.

18 John Moore, you did call Dennis -- where is John?

19 And, got that thing taken care? Okay, so, without further
20 ado, again, I welcome you to the meetings today and
21 tomorrow. I assume most of you are going to stay for both.

22 I think, again, we have a lot of very important things to
23 discuss and we do have the right people in the room here to
24 make those decisions. So, I appreciate your coming. I
25 think it will be a very worthwhile day.

1 Are there any questions about the agenda or
2 anything I need to cover that I didn't? Yes, sir?

3 MALE VOICE: Is that microphone working?

4 MR. COLEMAN: Is that just for you? That's just
5 for her. Do we need a microphone to be hooked up in the
6 room? I guess we do.

7 Well, I understand. The reason the area is a
8 hazardous area, the sign says. The air conditioning is not
9 working. It's going to be very warm and I suggest maybe we
10 take off our jackets. We can try it without the fans, if
11 you like, but I'll get the microphone as soon as I finish
12 and introduce Gil and Aves, I'll get someone to work on the
13 microphone if that's okay.

14 I guess that's it. At this time. I don't know
15 how you're going to do this, Dr. Ugiansky, Gil Ugiansky and
16 Aves Thompson are going to speak to us about the United
17 States system of weights and measures.

18 (Pause.)

19 MR. UGIANSKY: Aves and I are going to -- I'll try
20 to speak real loud and if our attorney could not talk in the
21 back of the room, it might help. I don't know how much it's
22 going to help for me to yell, but I'll try to yell. I know
23 the fans are loud.

24 All right, Aves and I are going to give a bit of a
25 review on what the weights and measures system in the U.S.

1 looks like, just to put this all in perspective. I'm going
2 to start it off and Aves is going to talk about a couple of
3 slides. We're going to go back and forth on this thing and
4 you've got the cheat sheet that says which slides are yours,
5 so I'll start with an outline of the talk.

6 We're going to talk about the legal authority for
7 weights and measures in the U.S., the U.S. weights and
8 measures structure, the role of NIST, the NCWM in the states
9 and the system, the economic importance of weights and
10 measures in the U.S. and the NTEP Program or National Type
11 Evaluation Program, a little bit, and instructor training,
12 what we've done in that area together to get to a uniform
13 weights and measures, and how you get information from our
14 system.

15 The first one is a legal authority and here we're
16 one of the fortunate programs in the U.S. that can point to
17 the Constitution. We can point to Article I of the
18 Constitution that says that Congress has the power to coin
19 money and regulate the value thereof, and for foreign coin,
20 and right after that, fix the standards of weights and
21 measures in the country. That's where we get our authority
22 here at NIST to be involved in weights and measures. That
23 has basically been delegated down to NIST from Congress.

24 And, then, also, there's a NIST Organic Act that
25 says that the Secretary is authorized to undertake the

1 following functions, and that's basically to cooperate with
2 the states in securing uniformity in weights and measures,
3 laws and methods of inspection.

4 When I finish and my voice is totally gone, we'll
5 have a microphone. I don't know why I'm looking up there, I
6 have it here. Weights and measures in the United States is
7 a unique system in the world. In all other countries of the
8 world that I know of, there's a single jurisdiction weights
9 and measures system, where it's a national program, the
10 person that runs the national program determines how the
11 weights and measures system works in that country.

12 In the U.S., it's totally different. It's a state
13 and local government function in the U.S., with NIST
14 involved with trying to get uniformity. There are some
15 federal laws that are mentioned here that pre-empt the
16 states and where there is a national function, a national
17 role of weights and measures, but mainly it's a state and
18 local function.

19 And, these laws, in fact, instill the state and
20 local weights and measures inspectors and programs carry out
21 the functions from these laws. The way the weights and
22 measures system is set up and the way it got started in the
23 U.S. is first we have the Constitution, we have Congress
24 below that, and then this authority was delegated down to
25 the Office of Weights & Measures, which was started in 1836,

1 when Ferdinand Hassler gave out sets of standards to the
2 states in the U.S. and that's the sort of official beginning
3 of the Office of Weights & Measures. The Office of Weights
4 & Measures was started then, and then later, Congress saw a
5 need to do other standards work and created the National
6 Bureau of Standards in 1901, enlarging the Office of Weights
7 & Measures to the National Bureau of Standards.

8 Then, more recently, our office, the Office of
9 Weights & Measures, which is what I head, started a state
10 lab program in 1965 to work with the state metrology labs to
11 insure traceability of the standards down through the labs.

12 And, then, in 1988, Congress then changed the name of the
13 National Bureau of Standards to the National Institute of
14 Standards & Technology, gave us more functions and more
15 money in other areas, and weights and measures have still
16 stayed a very small part of this whole operation.

17 The efforts in standards get larger and larger and
18 we stay relatively small, and I'll talk about that later.
19 And, we at NIST or we at the Bureau of Standards created the
20 National Conference on Weights and Measures in 1905 as a
21 method to secure this uniformity in weights and measures in
22 the country, and we'll talk more about the conference and
23 Aves will talk about that specifically.

24 And, then we created regional measurement
25 assurance programs which works with the state labs programs

1 to get this traceability through the state labs. Aves, I
2 think, is going to talk about the state side of this thing,
3 if you want to take over? You can come over here, if you
4 want. You'll have to come over here.

5 MR. THOMPSON: As Gil mentioned, the weights and
6 measures systems in the United States is somewhat unique in
7 that there are what appear to be a lot of fragmented
8 different sorts of jurisdictions. The framers of the
9 Constitution felt that the best government was that closest
10 to the people, therefore, early in the history of the United
11 States, you find weights and measures programs being
12 established at the city, town and county levels. And, to a
13 large extent in the East Coast today, that system still
14 exists.

15 You may find a state organization that has
16 oversight responsibility, where counties and townships and
17 local cities have some sort of reporting relationship.
18 Those relationships vary, depending from state to state.
19 Some cases, those local jurisdictions are completely
20 autonomous. Other jurisdictions, you'll find that those
21 local organizations have some direct reporting
22 responsibility to the states.

23 You'll find state weights and measures programs in
24 different departments within state government. You'll find
25 them typically in a Department of Agriculture, as weights

1 and measures was very important in the agricultural
2 development of our country. In fact, if you go way back,
3 you'll find that the initial weights and measures programs
4 were the customs houses on the coasts and the ports of
5 entry, for the import and export of grain and other
6 agricultural products.

7 You'll find departments of weights and measures or
8 divisions of weights and measures in Departments of
9 Commerce. Some states see this economic regulation role as
10 one of assisting in the development of commerce. You'll
11 find it in Consumer Affairs Divisions and this is sometimes
12 viewed as a consumer protection activity. You'll find most
13 of the states have a state laboratory. Some of those state
14 laboratories are a one-person operation. Other state
15 laboratories such as Ohio, California, and some of the other
16 larger states, have staffs of 15 or 20 and they do a
17 tremendous amount of measurement work. Maybe we'll just
18 move on from there.

19 MR. UGIANSKY: I was going to talk about the role
20 of NIST a little bit again. Our primary mission is to
21 achieve uniformity in weights and measures in the U.S. NIST
22 has no regulatory authority. You probably all know that,
23 but that's a reminder. We're not a regulatory agency. The
24 state and local weights and measures jurisdictions are the
25 regulators. We're here to try and get uniformity in the

1 laws and methods of testing, etc.

2 We created the National Conference, as I said, in
3 1905. It's been pointed to as a unique and even a model
4 collaboration between industry and government to further
5 cooperation with the states. There was a National Research
6 Council study a few years ago that looked at -- let me pause
7 a minute. Let me just pause for a couple of minutes and let
8 them set up the sound.

9 (Pause.)

10 MR. UGIANSKY: The National Research Council
11 National Academy of Science study that looked at that
12 voluntary standards operation in the U.S. the way the
13 government interacts with standards organizations and it was
14 a rather negative study, in general. The only positive part
15 in that whole study was to point to the collaboration NIST
16 has with the National Conference on Weights and Measures and
17 label that as a model that other collaborations should
18 follow. So, it really is a model of collaboration that's
19 been working well and will continue to work well. Can you
20 hear me in the back now? Yes, Tom says he can hear it fine,
21 a little too loud.

22 So, as I said, it's a model of collaboration and I
23 don't have to yell anymore and that's wonderful. The role
24 of NIST is also to have oversight for insuring traceability
25 of the state lab's measurements and I talked about that a

1 little and we'll talk about it more in the matters of
2 National Type Evaluation Program, which is the subject of
3 tomorrow's workshop that most of you probably will be here
4 for.

5 Our role here in the Office of Weights & Measures
6 in the National Weights and Measures Program is basically to
7 provide the centralized government functions for
8 coordination of industry and regulatory issues, to again, to
9 promote uniformity. And, I'm not going to read all these
10 things. You can read them and anybody that wants a copy of
11 my presentation, just give me your card or something with
12 your e-mail address and I'll e-mail you the presentation or
13 mail you a hard copy, if you want.

14 We do the technical support, all the areas listed
15 there, and we do training of state and industry metrology
16 people and positions. And, we have a pretty good system of
17 information dissemination, the handbooks and then some of
18 the websites that I'll list at the end of the talk. I think
19 this is where Nave takes over again.

20 (Pause.)

21 MR. THOMPSON: As Gil mentioned, the National
22 Conference was formed in 1905. At that time, it was viewed
23 that there was a need to try to create some uniform things
24 throughout the various states of the Union at the time.
25 Weights and measures laws and regulations is still primarily

1 a state's rights and issue. States proclaimed their
2 independence in that area, so this is an effort to begin to
3 draw together a conference that would provide state and
4 local weights and measures to meet at least once a year to
5 talk about issues and try to develop some uniform standards
6 and documents.

7 Membership in the conference is open to anyone who
8 has an interest in weights and measures. We have members
9 from state, local and county organizations, regulatory
10 organizations. We have members from other state agencies,
11 highway patrols, Departments of Transportation, folks who
12 are involved in weighing and measurement of any kind. We
13 have members in many of the consumer products industries,
14 packaged foods, packaged products, anything that's labeled
15 by the weight and measure of comp. It's any kind of
16 commercial activity like that is regulated by weights and
17 measures community.

18 The conference has a system that has several
19 standing committees who meet and take input, take issues.
20 They develop the issues and develop recommendations for both
21 our annual meeting -- should I stand back here?

22 We meet at an interim meeting in January. We meet
23 -- at that meeting, we develop the issues. The committees
24 work hard to take the input and to develop final proposals
25 for vote at our annual meeting in July. We adopt, we in the

1 conference adopt standard or model laws and regulations
2 which, at that point, are recommendations to the various
3 weights and measures jurisdiction. The law, the model laws
4 and regulations do not become law in any particular state
5 until such time as the state case asks you to do that.

6 Some states adopt these model laws through an
7 automatic adoption process in their statutory scheme of
8 laws. Others have to adopt through an administrative
9 process which can be time-consuming and costly, if you have
10 to go through that process each and every year.
11 Legislatures are sometimes reluctant to allow adoption,
12 automatic adoption or future additions, because they somehow
13 feel that that's taking away their prerogatives in adopting
14 laws.

15 I personally feel that the adoption, the automatic
16 adoption process is the proper way to do that, provided that
17 your state has proper representation at the interim and the
18 annual meetings and the whole conference process. You can't
19 just come to a meeting twice a year and think that you're
20 going to have an influence or have some impact on weights
21 and measures regulation in the United States.

22 Some of the model laws and regulations that the
23 conference produces is the NIST Handbook 133, checking the
24 contents on packaged goods. This is a document that
25 prescribes test methods for packaged products, both in

1 liquid and solid form. That, and the Handbook 130 is a
2 compilation of several different laws and regulations that
3 goes all the way from the weights and measures law, which
4 sets out a model that the states can use to be sure that
5 they contend that their own law contains all the key
6 elements.

7 We have uniform laws on National Type Evaluation,
8 or uniform regulation on National Type Evaluation. There's
9 some uniform field -- help me, what is that -- Waterfield
10 regulation law. There's some unit pricing, there's method
11 of sale, there are packaging, labelling, voluntary
12 registration, and there are probably more that I failed to
13 mention.

14 And, here again, these are models that the states
15 can take back to their jurisdictions and adopt either as
16 written or modify them for their own use. We encourage the
17 states to follow these model laws and regulations as closely
18 as possible. This is another effort to try and gain
19 uniformity.

20 This Handbook 44 is the specifications, tolerances
21 and other technical requirements for weighing and measuring
22 devices. Handbook 44 is generally recognized as the Bible
23 of the weighing and measuring device use and operation of
24 the United States. If your device meets Handbook 44
25 specifications, you could be generally assured that your

1 device will be accepted for commercial use at any state in
2 the country.

3 We talked a little earlier about the various
4 different types of jurisdictions. You can see by the pie
5 chart there that there are some 756 total weights and
6 measures jurisdictions in the United States. That seems at
7 first blush to be an unwieldy amount, that it would be
8 impossible to try to gain any kind of a uniformity in that
9 many different jurisdictions, because you've got 756
10 different directors. Sometimes directors of weights and
11 measures get pretty hard-headed. He nodded in agreement
12 with that.

13 But, our conference is an attempt to try to bring
14 all these people together, and hopefully, they're like-
15 minded people in that we're all looking for that certain
16 objective that says, we want to create equity in the
17 marketplace where buyer and seller can feel confident that
18 trade measurements are accurate.

19 It's just a continual, to give you some examples
20 of the state budgets, look at Texas with 18 million people
21 has a weights and measures budget of \$2.6 million and per
22 capita, that's 14 cents. Nebraska, on the other hand, at
23 the bottom of the chart there, is 1.6 million people with a
24 budget of \$1.1 million or 67.8 percent.

25 In Alaska, we have some 600,000 people. We spend

1 a little more than \$1 million that comes up to something
2 about the equivalent of the price of a gallon of gasoline
3 for every man, woman and child in the state, and we feel
4 that's a bargain. But, you can see that other states are
5 doing it for less. There was a little editorial comment in
6 that, by the way.

7 And, at this point, I'll turn it back to Gil.

8 MR. UGIANSKY: We're going to just talk a little
9 bit about one of the methods that we use to help get
10 uniformity in weights and measures in the U.S. and that's
11 through our instructor training program, and here I'm just
12 going to give it some data on the leverage that we get in
13 that program.

14 We did a survey for the classes that we taught
15 between March of 1995 and February of '98 and let me first
16 explain how these instructor training classes worked. NIST
17 has money that we have put in the form of a grant for the
18 conference, and then the conference pays through that grant
19 for the travel and expenses for the inspectors from states
20 to come in to be trained as instructors. And, the agreement
21 that is made before that we agree to accept someone for a
22 class is that that person will come through the training.
23 The state will adopt the procedure that we're training and
24 the state will use that procedure, and that person will go
25 back home and train other people in that state.

1 And, the third thing is that occasionally, when we
2 need it, one of those trainers, one of those instructors
3 help, going to another state to do some training that he
4 will assist us, you know, if we provide expenses, etc. And,
5 this program has worked very well, as you'll see from the
6 numbers here. We had four people in that period of time to
7 train 205 instructors from the states. They went back home
8 and trained over 6,000 people, including over 2,000 people
9 from industry. And, these are just phenomenal statistics, I
10 think, and the leverage is great and it's the main part of
11 the budget initiative that we have going forward now, again,
12 for a second year at the level of \$6.4 million for weights
13 and measures, the weights and measures initiative, weights
14 and measures in the U.S. basically.

15 And, most of that money is for enlarging this
16 instructor training program. When you do the random
17 selection of this, you don't know how long it's going to
18 take some of these screens to come up. This is just a list
19 of the number of participants that have been in our training
20 program for metrologists. Georgia Harrison in our office
21 runs a program training metrologists, and we've had people
22 from, of course, all the states and then a lot of industry
23 people.

24 This has all laboratories accredited by NVLAB. I
25 think there's a mistake on there. We do have a program

1 where NIST has agreed to pay for NVLAB accreditation for the
2 states and by the end of this, by December of this year, we
3 will have something like 17 states will have applied for
4 NVLAB accreditation.

5 We've also had people from other countries
6 participate in these training programs. To look at the
7 economic impact of weights and measures, we did a little bit
8 of a study in the office on how much is under that weights
9 and measures regulatory umbrella. It does not count the
10 part of the metrology training and the metrology influence
11 that they have, for example, where people from Glaxoe
12 Welcome came and got training on mast standards, etc., and
13 have traceability of their standards to the state lab
14 program. But, their products may not be tested for the
15 weight of medication in a particular pill.

16 Weights and measures, I think, in that case, only
17 regulates the count of the pills. Weights and measures
18 doesn't check that there's 20 milligrams of lithoteter in
19 there, a tablet that you take to lower your cholesterol. I
20 think the FDA is in charge of that, and I'm not sure what
21 they do.

22 But, we looked at all the things that are under
23 the regulatory umbrella for weights and measures and this is
24 1996 data. We're in the process of updating it. But,
25 still, the percentage is probably going to be close to the

1 same. It's basically more than \$4 trillion of the U.S.
2 economy is under that weights and measures umbrella that's
3 affected by the regulatory action of the state and local
4 jurisdictions. It's over 54 percent of the GDP of the
5 country.

6 MR. THOMPSON: Gil, if I might just interject at
7 that point -- that's a very significant part of our economy
8 and the states and the local governments invest upwards of
9 \$100 million or more annually by the weights and measures
10 regulations in the marketplace.

11 MR. UGIANSKY: But, it's a very small percentage,
12 there's still very high leverage, which is the point that we
13 all try to make with our governments to fund the programs
14 even better. And, these are the details of how we got that
15 number, and some of the things that are on here that weren't
16 on here very long ago, like other retail sales, where is
17 that? Is that where price verification comes in, Tom? Yes,
18 price verification is an issue where weights and measures
19 wasn't -- it's not weight and measure and count, really, but
20 industry had a problem with the scanners some years ago and
21 came to the national conference and said, we need a
22 standard. We want you guys to regulate this, we want you to
23 check our scanners, and so the weights and measures
24 jurisdiction are doing that now and that adds a good
25 percentage to the part of the economy that's under the

1 weights and measures jurisdiction.

2 But, you can see in the transportation area here,
3 which is what we're talking about today, I guess it's all
4 under there, and that's a pretty sizeable number of billions
5 of dollars that are in the transportation industry, not all
6 of it the subject of today's discussion.

7 The way the weights and measures, at the heart of
8 the weights and measures system in the U.S. is the
9 traceability and traceabilities of standards. And, what the
10 people down here, when the user or consumer buys something,
11 you have to have assurance that the measurement for that is
12 traceable all the way back to international standards, and
13 we all use the same pound or same kilogram, basically. So,
14 there's a system set up where the international standards
15 are traceable to NIST and NIST to the state laboratories and
16 the state laboratories calibrate this, they deal with
17 standards that are used out in the field and the devices are
18 checked through the NTEP Program and calibrated and checked
19 by the standards that are calibrated in the states. And,
20 then, onward down to the products that are bought and sold
21 by either the end user or the consumer.

22 This traceability of the standards is also an
23 interesting thing in terms of leverage. The state
24 laboratories do most of the work in calibrating standards
25 that are used out in the real world. NIST does very few

1 calibrations. The Metrologist Committee did a study of how
2 many standards are tested annually by the weights and by the
3 metrology labs in the states. And, they came up with a
4 total of almost 340,000 standards that are tested annually
5 in the states and we had this on a slide, and I more
6 recently asked, how many standards are calibrated in this
7 that are traceable than through this whole system? And, it
8 turns out, on the average, only about 29 standards per year
9 are calibrated in this, to give you a huge leveraging
10 effect, from one to over 11,000.

11 And, basically, all these calibrations that are
12 done by the state labs are all, they all disseminate missed
13 values. They're traced back to the missed standards, which
14 are then traced back to the international standards.

15 The National Type Evaluation Program is another
16 important part of our program here in the Office of Weights
17 & Measures and the National Conference on Weights and
18 Measures. It's a program that, at the manufacturer's
19 expense, evaluates prototypes of commercial weighing and
20 measuring devices against national and/or international
21 standards, because we're now doing INL standards as well as
22 the standards of the conference.

23 It's a joint program with NCWM, the states and the
24 device manufacturers and we're going to be talking a lot
25 tomorrow about the future of the NTEP program and

1 specifically about production needs type or conformity
2 assessment. We at NIST run the program with the state labs
3 that do testing to issue certificates, the certificates of
4 conformance -- that devices are tested and they're
5 certified, that they conform with the standards of Handbook
6 44, basically. And, then they get a certificate of
7 conformance, so that company can then sell that license in
8 some 44 states that have adopted NTEP.

9 This just shows the activity in the NTEP program
10 since 1993. The program was actually started in about '88
11 or earlier, and it just shows the cumulative number of
12 certificates is the main thing to look at here that are
13 outstanding. That's the number of devices, device types
14 that have certificates. One certificate here is for a
15 prototype and many, many copies of that model are sold. So,
16 this is not indicative of the number of devices that are
17 sold, it's indicative of the number of certificates.

18 And, you can see there's been steady growth and
19 we've had some sort of ups and downs and, in fact, this
20 year, this state is probably not going to be anywhere like
21 what it shows there, because it's down a bit because we did
22 several things in the program. We raised the application
23 fee for the program, and we also did some things that would
24 discourage people from applying before they're ready to
25 apply, like a "three strikes you're out," kind of thing, or

1 if your device fails three times, you go back to the
2 beginning of the line and you have to re-apply. And, if you
3 get ready to -- no, that's not exactly correct, Tina. Oh,
4 we haven't implemented that yet. We're going to implement
5 that. We're thinking about implementing that.

6 There's another part that maybe we haven't
7 implemented yet, either, where if the device, if the lab is
8 ready to start doing the testing on the device, if the
9 device isn't delivered to the lab within a certain period of
10 time, you also go back to the beginning of the line and have
11 to re-apply.

12 But, those things, I think, are making some of the
13 people that would -- in the system we had before, you could
14 apply anytime, even though your device wasn't ready to be
15 tested, and when you got to the front of the line, you just
16 let yourself, let your application sit there until you got
17 the device ready.

18 Now, there's a penalty for that, so I think less
19 people are applying this year because of that. That's my
20 theory, at least, and we're checking that it's affecting our
21 budget greatly, so we're checking every two weeks to see how
22 we can project our budget for this year.

23 Some of the things that have come out of our
24 program here at NIST in collaboration with other agencies,
25 and I know this is a thing that is a rather sensitive issue

1 for a lot of people, because a lot of people got kind of
2 angry that we did a big study like this and had a big press
3 conference with FTC and publicized the issue, but there was
4 a Milk Study in August of '98 and then there was a followup
5 study -- when was that completed, Tom, the following year?
6 This is the follow up study, I'm sorry. There was one
7 before, the year before that, the follow up study. This is
8 reporting on a follow up study, where we had federal
9 agencies, FTC, USDA, FDA and this involved in the study and
10 44 states and two territories, the Virgin Islands and Puerto
11 Rico participated, as well as 44 states. And, our office
12 worked with the state and local officials through the
13 conference to basically re-do this to achieve uniformity,
14 and also to solve underfilling problems.

15 What it demonstrates is that the measurement
16 system really works. There was very little data that had to
17 be thrown out because the tests weren't done right by the
18 state and local jurisdictions and it also showed that from
19 one year to another, in doing two of these, that there was a
20 great improvement in the industry. Maybe not as much as
21 some of us might have hoped, but it is a rather large
22 improvement. Forty-five percent of the lots failed to test
23 in '97. Nineteen percent failed in '98, so it's a huge
24 improvement.

25 And, if you look at the economic impact of that,

1 if you can extrapolate and say that's what was occurring all
2 year long and that's an assumption and it's not necessarily
3 correct, but if you do that, \$8 billion worth of milk are
4 sold each year. And, if you take the rejection rate,
5 basically, and you look at how much short, how much milk was
6 missing from the containers, that's the percent underfill on
7 these things, and calculate it out, you end up with those
8 two studies, between one and the other, saved \$17.2 million
9 per year to competitors and consumers. And, I think the
10 important thing is that it saves it to competitors.

11 Because, if you've got one person that's following
12 the rules and doing it right and the guy down the street or
13 in another state is doing it where he's underpacking the
14 product and has an economic advantage over you and your
15 company, that's a real serious matter for somebody running a
16 business.

17 MR. THOMPSON: If I might just tag on here, Gil?

18 MR. UGIANSKY: Go ahead.

19 MR. THOMPSON: The conference learned a couple of
20 things out of its Milk Study. Number one is that the
21 measurement system, in fact, does work. The forces were
22 marshaled, they went out and did tests and it had an
23 enormous impact on the milk industry.

24 The second thing is that we learned that we needed
25 to develop a method whereby the conference and our friends

1 at Office of Weights & Measures cooperate on these future
2 studies of this kind. So, we worked for the last year or
3 more developing the protocol that sets out a series of steps
4 that both of us will perform and conduct in the process of
5 getting through a national survey. And, what this does is
6 to assure that proper steps have been taken at the local and
7 regional areas before we suddenly put somebody's name on the
8 front page of the newspaper, and to assure that proper
9 procedures and methods have been followed.

10 We worked very hard on that protocol and we're
11 going to vote on it at our meeting in July in Burlington, so
12 that's our take on the study.

13 MR. UGIANSKY: Thanks, Aves. This is just a
14 little bit of a kind of thing that I use here just to show
15 the leverage of weights and measures and then the example
16 given is the four instructors training 205. And, you
17 basically go down a pyramid to, at the bottom, you're
18 impacting on over 54 percent of the GDP. And, then, Georgia
19 Harris did the same thing for the metrology program, to show
20 how many groups at NIST were involved, how many divisions,
21 how many customers, the number of individual tests, and then
22 the labs, etc. NTEP labs and the state metrology labs, the
23 number of field staff, the registered service agents that
24 are impacted and, again, we need to get better numbers on
25 the actual metrology influence on the economy, separate from

1 the regulatory.

2 And, these are the ways that you can get
3 information from us. There's a fax on demand line, an 800
4 number for that. And, we have websites that all can be
5 gotten to through this one, but there's a specific one for
6 NTEP, because we have all the NTEP certificates. Since the
7 beginning of '98, all the NTEP certificates are on the web
8 in PDF format now, so that you can look them up, you can
9 search for anything in those certificates. And, we're in
10 the process, we have a contractor, now, to get all the
11 certificates on the web. Did I say PDF format? And, with a
12 search engine, so that you can do full-text searches of the
13 certificates.

14 The conference has a website, and there's e-mail
15 that you can get to us either individually or through the
16 office e-mail. And, that's it for this presentation.

17 MR. THOMPSON: I'd like to make just one final
18 comment.

19 MR. UGIANSKY: I knew that was coming, sorry.

20 MR. THOMPSON: The conference is interested in
21 creating as much uniformity as we can throughout the
22 country. It's my firm belief that weights and measures
23 regulations and enforcement is, in fact, that marketing
24 place infrastructure that gives us the confidence to go to
25 the store and go to the gas station and feel that we're

1 getting fair measures for our money. And, it's a place
2 where we can be here today, and I hope that this is a useful
3 and productive meeting and I'm looking forward to tomorrow.

4 Thank you.

5 MR. COLEMAN: It appears I'm doing a really good
6 job keeping us on track and on time. I'd like just to re-
7 emphasize Gil's comment about the presentations. We do not
8 have those available for you today, but we can make those
9 available to anybody that would want those, if you'd let me
10 know or the person that's making the presentation, I'm sure
11 that won't be a problem.

12 What we need to do now is, are there any
13 questions? Any comments? Please take a few minutes. We
14 have to set up a little different system, hopefully, we
15 won't go through the bumps that we went through with this
16 one this morning, but we didn't anticipate no air
17 conditioning and fans. Obviously, the construction is
18 causing more difficulties than we had anticipated.

19 But, we got past it and it will be better for the
20 rest of the week. So, why don't we take a break until about
21 a quarter after and Wes, I have copies of the agenda for
22 you, or anybody else that needs those. Take a break until
23 about a quarter after and then we'll resume.

24 (Whereupon, a short recess was taken.)

25 MR. COLEMAN: Would everyone take their seats?

1 Our next presentation is going to be from an attorney that
2 represents United Parcel Service, Jim Moriarty. He's going
3 to speak on the UPS position on pre-empting for state and
4 local regulation on their license. And, we're going to have
5 a little hands on demonstration in the hallway, so he'd like
6 to speak to you for a minute and we're going to all go out
7 in the hall and look at an example of their system and then
8 we're going to come back in here for the rest of his
9 presentation.

10 So, at this time, Jim, I'd like for you to talk to
11 these people about UPS and pre-emption.

12 MR. MORIARTY: Good morning. My name is Jim
13 Moriarty and when Tom referred to me as an attorney, it
14 reminded me of a story where there were three people in a
15 boat in the middle of a lake. There was an engineer, a
16 priest and an attorney, and they were talking about whose
17 job or whose profession was the most important in life here
18 on earth today.

19 The preacher, of course, took priority and said,
20 you know, he worked for the top guy that really created this
21 world and that there was nothing before him, and out of this
22 chaos, God created this beautiful universe in which we live.

23 Well, the engineer said, well, you know, preacher,
24 you are right, but God could not build anything today
25 without the engineers that are here. We build the

1 buildings, we build the cars, we build everything else.
2 And, the lawyer stopped them both and said, well, gentlemen,
3 with all due respect, where do you think the chaos came
4 from? And, I'll take responsibility for the chaos.

5 But, on behalf of UPS, I would like very much to
6 thank you for taking time today for coming here to beautiful
7 Gaithersburg and joining us on this continuing dialogue that
8 we have had with NIST and the states for the past two or
9 three years. Before beginning, I would like to introduce to
10 those who maybe have not met Harry Winters from UPS'
11 Washington office is here with us. Charlie Quay and Jeff
12 Hoffmann are here from UPS, who are going to, in just a
13 little bit, help demonstrate and describe the two systems
14 that we're dealing with here, to better put in context our
15 discussions.

16 But, I would like to thank NIST and the conference
17 for putting together the resources to host this workshop.
18 Specifically, I'd like to thank Mike Rubin, Gil for talking
19 with us, for Tom for helping to coordinate, and for Ken
20 Butcher. I know Ken could not be with us today, but we do
21 want to wish him the best, and his family, as he's home with
22 his dad right now.

23 We are here today primarily to continue what has
24 begun as a constructive dialogue that we have had here and
25 with the states around the country over the past few years.

1 We are here to listen and to learn and to do our best to
2 accommodate the concerns that are expressed to us. We are
3 reasonable folks and we want to hear what you have to say.

4 I have said this to others and I'll say it to this
5 room. Our position here is not a frontal assault on Western
6 Civilization, okay? We really do have a very narrow
7 approach and a narrow focus, and we want to talk more with
8 you about that today. UPS is and will continue to be one of
9 the best corporate citizens that this country has ever seen,
10 and we take seriously the commitments we have to the
11 communities that we serve and which we provide our services.

12 So, being here today and the approach we're
13 taking, it's not without wanting to hear the views of our
14 partners that we deal with in these states to insure that
15 the right thing is done around the country. I was going to
16 go back and start talking about all the conversations we've
17 had since March of 1995, which started with like a phone
18 call from a fellow in Alaska, to Tom and to Ken, but that
19 really would take much too long to go through.

20 But, to put this discussion in context as to what
21 the issues are and maybe as to what they are not, I would
22 like now to ask Charlie and Jeff to demonstrate two systems
23 that we have out there. The first is our historical,
24 commercial counter, storefront, person comes in off the
25 street with a package, tenders it to UPS, it's weighed, it's

1 rated and it goes through our system. And, then juxtaposed
2 and contrast that with the latest UPS Online Professional
3 service which we provide to our very large, high-volume
4 shippers, to facilitate their use of our system. It is a
5 service. If we did not provide Online Professional, we
6 would not have that business. This is a service we provide
7 to compete in the marketplace and it's put on the facility's
8 other shipper in their back room operations that they
9 conduct.

10 We were going to do it here, but because the table
11 it was on was going to be lower or eye level or even lower
12 than where you are, we thought it would be better to step
13 out into the sunshine and to walk through those systems,
14 answer any questions you might have and then come back here
15 in the room, if that's okay. Thank you.

16 (Whereupon, a short recess was taken.)

17 MR. COLEMAN: The reason we came back in is we
18 obviously need this information and I'd like to suggest that
19 we bring up some of those questions again so that we can
20 have a record of what we said and what we tried to
21 accomplish here. It's great to have the dialogue and it's
22 very valuable, and there's no need to replace that. But,
23 now we have the opportunity, on the record, to say the
24 things we need to say and make the points we need to make,
25 and that's why you came today, to be able to say what you

1 wanted to say to the appropriate people.

2 So, if we could just continue that dialogue and
3 then we'll go ahead with the presentation, and I think that
4 will be fine.

5 MR. MORIARTY: Thank you very much and I know now
6 we've got everybody's attention. It got a little hot, so I
7 grabbed some water. What I'd like to do now is just kind of
8 walk through -- and I don't want to spend too much time on
9 the cases or the statutes and everything else, but just to
10 walk through what our position is and how we got here, so
11 then we can have this constructive dialogue.

12 Because, you know, we learned some things out in
13 the hallway that we think are legitimate reasons for the
14 states and the fine work that you guys do. Let me see if I
15 can work this. We're not as fancy as Gil and the rest of
16 you guys here, but, you know, we did think long and hard
17 about coming here today and participating. We talked with
18 Mike and with Gil and Tom and Ken and everybody else, to
19 come here and to tell you frankly and honestly, but in a
20 spirit of cooperation, what our position is and what we
21 would like to see come out of the discussions today.

22 It will come as no surprise to you, and I think I
23 have copies of this, that our position is that effective
24 January 1, 1995, Congress pre-empted state laws and
25 regulations that relate to, those are the words, to a

1 service of UPS. When we are out competing in what is
2 becoming an increasingly competitive marketplace -- and just
3 this morning's Wall Street Journal, Airborne, one of our
4 competitors, signed an agreement with the Postal Service,
5 who is also here and one of our competitors, with the Postal
6 Service, to provide local delivery of airborne packages.

7 Now, this is the Federal Government helping a
8 competitor deliver packages. Okay, this is the type of
9 thing we're dealing with. And, I know that Po may have
10 something to say about that later, but it's not just here
11 domestically. It's internationally, we're dealing with a
12 lot of different issues. So, I just want to kind of put
13 that in perspective for you.

14 Now, the reason we get here is that there are
15 federal statutes that give UPS certain rights, and one of
16 them is the pre-emption statute. Now, we have used that
17 statute as we'll find later in defending UPS from some very
18 serious claims that were brought against us by class action
19 shareholders and others -- not shareholders, sorry. Class
20 action representatives that are trying to bring claims
21 against UPS for pocket loads of money. But, as well as in
22 other situations, where pre-emption has really helped us
23 level the playing field and the marketplace.

24 We're going to review the cases, we're going to
25 review our own experiences under this statute. You know,

1 the role of the state regulation is a legitimate role the
2 state regulation has, and we would then like at the end of
3 today, to identify certain goals, you know, or
4 recommendations that we all can share and then try and
5 develop an action plan to get us there.

6 Now, I know nobody here needs a Pre-emption 101,
7 but pre-emption occurs when the federal interest supersedes
8 those of any state or any territory or possession, and it
9 frequently applies to those matters that are considered of
10 such national importance that federal law must take
11 precedence over state or local law, and that the
12 inconsistent state laws are found granted.

13 What that means, basically, is in January 1, 1995,
14 Congress took a very serious step. Congress eliminated
15 state, economic and other regulations of companies like UPS.

16 Why did they do that? Because UPS was under an old world
17 structure, where we had to file tariffs, we had to give 30
18 days notice. We had to do all this kind of stuff. Our
19 competitors would have 30 days in the marketplace to not
20 only get a better product to the market, they would piggy-
21 back on all the research we had done and then come in and
22 say, well, we'll do it for two pennies less.

23 We're dealing in a world here of default rate
24 structures, where one penny takes a package from us and
25 gives it to somebody else. That's what Congress was very,

1 very concerned about, and that the state mechanisms have
2 been built up were actually impeding the free flow of
3 commerce, which I know you guys are very interested in and
4 want to promote, as do we.

5 Again, Congress does not lightly pre-empt states
6 and it really only does it, and these are the findings that
7 Congress made in that statute, the Federal Aviation
8 Administration Authorization Act of 1995 -- for us lawyers,
9 you know, it's very long-term. But, a state regulation,
10 when it imposes an unreasonable burden on interstate
11 commerce, when it increases the cost of getting business
12 done, when it hurts actually the ultimate consumer of the
13 product, when it impedes the free flow of trade, which is
14 what we're all here about, and transportation in interstate
15 commerce and places an unreasonable cost on the American
16 consumer. And, from this morning, from Gil's presentation,
17 we found how NIST and the conference and what they do
18 leverages our cause to help everybody.

19 Pre-emption is not a new concept and it's
20 definitely not a new concept in the transportation industry.

21 It goes back to 1978, when Congress first passed the
22 Airline Deregulation Act and pre-empted state regulations as
23 airlines, air carriers and air services, as well as claims
24 that people could bring -- frivolous claims that people
25 could bring in State Courts or Federal Courts against

1 airlines.

2 It was followed then in 1980 with the Staggers
3 Rail Act. Everybody here knows the tremendous economic
4 pressures that the railroads encountered in the late
5 seventies, including bankruptcies. Now, the rail lines,
6 like the motor and air transportation are keys to the
7 continuing growth and success of this great nation that
8 we're privileged to live in. The Staggers Rail Act was
9 intended to give the railroads an opportunity to become
10 self-sufficient again and to earn adequate revenues for the
11 services they provide, so that they wouldn't go bankrupt and
12 we all wouldn't be in a stage of paralysis.

13 That was followed two years later in 1982 to
14 assist the bus industry here in the United States,
15 transporting passengers all over the country and let them
16 compete on a level playing field. In 1992, the United
17 States Supreme Court first issued a decision under the 1978
18 statute in a famous case called Morales. And, in that
19 decision, the Supreme Court used very, very broad words
20 about the intent of Congress and the pre-emptions that would
21 apply to state regulation. And, it was any state law or
22 regulation that relates to, that has a connection with, that
23 touches a service that a carrier provides.

24 After Morales, the act that we're dealing with
25 here that was passed in 1994 and became effective January 1,

1 1995. Congress had specifically in mind what had happened
2 since 1978 and had specifically in mind what the United
3 States Supreme Court had said in 1992 when it passed the
4 FAA. The legislative history memorializes that, the statute
5 itself memorializes that.

6 They wanted to bring what they saw as a positive
7 impact from 1978 on to the industries that appear before you
8 today. They wanted to extend that to companies like UPS.
9 In 1995, there was another Supreme Court decision, the
10 Wolens decision, where, again, the United States Supreme
11 Court broadly interpreted the statutes and applied it
12 against claims brought under an Indiana Consumer Protection
13 Statute against an airline.

14 And, then, in 1995, the old, old federal ICC was
15 terminated and its powers now have been evolved into the
16 Surface Transportation Board and some of them to the Federal
17 Department of Transportation. Jim Dann, who is one of the
18 Assistant General Counsels there, is going to be here this
19 afternoon to kind of talk from their standpoint as to what
20 this creation means.

21 I'm not going to repeat the first two bullets, I'm
22 just going to go through what I already said. But, when the
23 1994 legislation became effective on January 1, 1995, and
24 this passed, various states, various state commissions,
25 probably some in this room, vigorously challenged the

1 constitutional of that title statute. They took us to a
2 Federal District Court and they took us to a Federal
3 Appellate Court, and ultimately, they took us to the United
4 States Supreme Court, and each one of those Courts found,
5 although the Supreme Court did not take the appeal, but each
6 of those Courts found that this statute is constitutional,
7 and that it does properly place restrictions on states
8 having to do with the free flow of trade here in the United
9 States.

10 Now, since January 1, since March of 1995, really,
11 we have been in discussions with various states, with the
12 fine folks here in this room, to try and come to a
13 resolution of this issue without getting into a big fight.
14 UPS takes very seriously its position here and the rights
15 that it has, but also realizes that there are other views
16 out there and we're trying to accommodate them.

17 The District of Columbia Department of Consumer &
18 Regulatory Affairs decided that no, they weren't going to
19 wait for this process, they were going to push the issue,
20 and UPS very strongly opposed that and D.C. found that their
21 total provisions are pre-empted as to UPS. And, there are
22 other states where the State Attorney Generals have found
23 that the state provisions are granted as to UPS. Not all
24 states, but a number of states.

25 The reason for this is that not only did Congress

1 pre-empt states, but they also did a second thing. That is,
2 they said, we're not going to remove states completely from
3 jurisdiction over companies like UPS, so you will still, and
4 this is explicitly in the statute, where they retained these
5 three specific jurisdictions. One is safety regulatory
6 issues. States do have roles, to be sure, but the vehicles
7 are out there that are providing these services that they
8 need safety concerns, that the carriers that are out there
9 have the financial backing and wherewithal to provide
10 responsible services in interstate and intrastate commerce.

11 And, states do continue to have a role in the
12 transportation of household goods, because most people use a
13 household good mover maybe once or twice in their life, and
14 they're dealing with them in an individual capacity, you
15 have a role to play there.

16 But, Congress did not allow states to retain
17 authority, to regulate or have impact on services. And, the
18 legislative history then goes further than the statute and
19 says, by retaining these three jurisdictions, we want to
20 make it very clear that we don't expect states to go back
21 and indirectly try and do something that they can't do
22 directly. So, Congress said it once in the statute, said it
23 twice in the statute, and then said it a third time in the
24 legislative history.

25 I know some of you are struggling to see this. I

1 will have a handout at the end. I'm not going to repeat all
2 of these bullets, either, because we've covered it, but the
3 two final bullets, I would like. The one is in a Federal
4 District Court in Georgia, where a class-action lawsuit was
5 brought against UPS on behalf of one or more shippers,
6 though we never really knew how many shippers were out
7 there, and the claim was that we were obligated to charge
8 the actual rate versus the dimensional weight of the
9 package. And, UPS, since time and memorial, has a
10 dimensional weight system and that is, if a package sees a
11 certain size, it gets X pounds weight, it does not get the
12 actual weight. What the Federal District Court found was
13 that very claim by these class-action lawyers was pre-
14 empted, that UPS was not required to provide the actual
15 weight. They could bill dimensional weight or any other way
16 they wanted to, that it was tantamount to a state telling
17 UPS how to bill for a certain system and how to use weight
18 for a certain system.

19 The Federal Court found that that was unlawful and
20 that was pre-empted.

21 Now, yesterday, we got a copy of a letter that Jim
22 Dann sent over to the fine folks here at NIST. That letter
23 disagrees in some respects with what we're saying today. I
24 talked with Jim last night. We just got the letter less
25 than 24 hours ago. We're going to have discussion with Jim.

1 There are parts of that that we agree with and parts that
2 we disagree with, but what it shows is there are more than
3 one opinion about where this issue is and where it's going.

4 It's constantly evolving. I'm sorry?

5 VOICE 1: I said, any time you've got two lawyers,
6 that's the chance you're going to take.

7 (Laughter.)

8 MR. MORIARTY: That's right, but the great thing
9 about this country is, every party is entitled to have a
10 lawyer, whether it's Civil or Criminal Court.

11 (Laughter.)

12 MR. MORIARTY: Every family, everybody has a
13 lawyer now. But, here I just wanted to list and we'll go
14 into more detail later if we have to, but we have -- it's
15 not that we have used, it's an interpretive device that pre-
16 emption legislation pre-empts claims against us based on
17 antitrust violations, claims of pricing discrimination.
18 It's found to pre-empt claims against us for negligence,
19 convergent or breach of contract. It's found to pre-empt
20 plans for defamation, which any large business here in the
21 United States today gets claims made against them for
22 anything, and an infliction, intentional infliction of
23 emotional distress and, then, of course, it was applied by
24 NBC.

25 But, where we want to be with everybody in this

1 room is, we're here to listen and learn. We want to answer
2 any questions that you have, address any concerns that you
3 have. We'd like to identify where the goals are, where does
4 everybody want to get? Discuss options that we all have for
5 getting there, and then try collectively to develop an
6 action plan.

7 We very much, again, appreciate the time and the
8 hosting of this meeting by the conference and by NIST and
9 look forward to talking with you more now and over lunch.
10 Thank you.

11 MR. COLEMAN: Are there questions in the hall?
12 Would you come up to the microphone, please?

13 MR. THOMPSON: My name is Aves Thompson. Is this
14 working?

15 MR. COLEMAN: Yes.

16 MR. THOMPSON: All right, my name is Aves
17 Thompson. I'm with the State of Alaska and I'm the chairman
18 on the National Conference on Weights and Measures.

19 You referred to several states whose Attorney
20 Generals had determined that -- and I'm not sure what the
21 termination was, but there was some pre-emption involved
22 there. Could you expand on that a bit? Is it pre-emption
23 from all weights and measures regulation for all UPS scales
24 under every circumstance, or is it more limited?

25 MR. MORIARTY: The information I have, Aves, is

1 not direct, because what we have done for the 18 states that
2 have contacted us and talked with -- and Alaska was the lead
3 in the nation here -- we would send various materials to
4 them. We would talk with their AG's office.

5 We were never told directly what states had
6 decided, but, I mean, I learned indirectly that in the State
7 of Georgia, that the weights and measures folks there were
8 told that, you know, they had no role to play, not only in
9 the Online Professional, but also on the store fronts. Now,
10 that was not our position.

11 I mean, I think one of the positive things today
12 is to have a general exchange of information as to what our
13 position is, but the whole thing was found pre-empted in
14 Georgia. But, that was not communicated to us in a letter
15 or anything else. It's just there's no enforcement.

16 MR. THOMPSON: Thank you.

17 MR. MORIARTY: The great State of Kansas?

18 MR. COTSORADIS: Constantine Cotsoradis, State of
19 Kansas. First, I want to say, I appreciate --

20 (Pause.)

21 MR. COTSORADIS: Constantine Cotsoradis, State of
22 Kansas. First I want to say, thank you for participating in
23 this and I'd just like to reiterate a couple of the points
24 that were made in the hall. One, I understand it's not UPS'
25 corporate policy to recommend specific scales to the

1 storefront owners.

2 Also, it was brought up that despite not being
3 UPS' corporate policy, we experience that, that someone is
4 telling the storefront owners that this is the scale that
5 UPS recommends.

6 MR. MORIARTY: And, on that point, I mean, we
7 would welcome knowing specifically when that happens, so we
8 can address it.

9 MR. COTSORADIS: Would UPS be willing to provide a
10 memo to the Conference or someone, stating that position,
11 that you do not recommend a specific scale and do support
12 the use of scales that comply with standard applications?

13 MR. MORIARTY: I think we would be willing to talk
14 about a whole bunch of things and what we need to do is get
15 a list of what those are, and then we can decide, you know,
16 which ones we can live with and which ones we can't, but I
17 think that's a good idea.

18 MR. COTSORADIS: Okay, thank you.

19 MR. MORIARTY: Thank you. The great State of
20 Ohio?

21 MR. COLEMAN: Vicky, step up here.

22 MS. DEMPSEY: I have two questions, my first
23 being, how does UPS answer this question, on how does having
24 a scale inspected for tolerances and specifications affect
25 rates, routes or services, as to what I feel is pretty much

1 summed up in, I mean, it's a real simplified part of the
2 1994 Act. That's one question.

3 My other one is referring to the audit revenue
4 scales that you used in the hubs, how are those purchased
5 and is there any uniformity in how they're purchased or what
6 do you look at when you purchase those?

7 MR. MORIARTY: To your first question, the answer
8 is, very much. To your second, I'm not sure. Okay, what it
9 does basically, and this is what we presented to various
10 states, is the statute talks about relating to services that
11 we provide, and that means anything in connection with it.
12 What happens is, the states come into our -- and, this
13 doesn't happen all the time, and I know we're keeping a
14 record here, so I'm talking generically, I'm not talking
15 specifically, and we can address any specific concern.

16 But, states come in and go onto the facility of
17 our shippers and then walk through the back room -- you
18 know, back through their offices to the back room to look at
19 their scales. Now, that requires somebody at the front to
20 stop what they were doing, call to get whoever it is needs
21 to be there to escort them back. Whatever business was
22 being conducted on those scales at the time to stop, the
23 calibration to take place, the other inspection to take
24 place.

25 In the State of Minnesota, it takes anywhere

1 between a half an hour, I think, to an hour and 15 minutes,
2 is the things we've gotten. And, Ohio, I'm not really sure.

3 But, what it does is, it takes people away from what they
4 otherwise are doing. And, these systems only go to very
5 high volume shippers, so it disrupts commerce in the
6 clearest way.

7 (VOICE 2 asked question away from microphone.)

8 I'm sorry?

9 (VOICE 2 asked question away from microphone.)

10 MR. MORIARTY: Well, I appreciate your opinion.

11 VOICE 2: So, that means basically that the scale,
12 in your example, we'd be going there to inspect and if we
13 find the scale is ripping UPS off, it wouldn't be worth that
14 one hour to save you that?

15 MR. MORIARTY: We're not asking for that
16 protection, quite frankly.

17 VOICE 2: Or, in the other way, ripping off the
18 consumer.

19 MR. MORIARTY: But, it's not --

20 VOICE 2: I know you're not asking for that
21 protection, either.

22 (Laughter.)

23 MR. RUBIN: Maybe I could ask a question?

24 MR. MORIARTY: Yes, Mike?

25 MR. RUBIN: In the hall, I understood a statement

1 to be made by one of the people representing UPS, I'm not
2 sure who it was, that the presence of a contract between UPS
3 and one of your customers somehow or other propagated a
4 state regulation.

5 Do you see that based on the Pre-emption Act of
6 1994 or is that a contract argument or is that something you
7 really want to defend?

8 MR. MORIARTY: Well, I will defend anything UPS
9 says.

10 (Laughter.)

11 MR. MORIARTY: No, I think the point that was
12 being made was that when we provide services like this,
13 historically, UPS provided common carrier services, which we
14 did under a rate schedule and tariff filed with the Federal
15 Government and with state governments and on the other side,
16 we did it under a contract carrier service, where we had to
17 provide it consistent with the terms of a contract, and even
18 filed that contract, believe it or not, at various places at
19 various times.

20 I think what we're saying is, we provide these
21 scales to our high-volume shippers, who we may have a
22 contract with, and we will give them certain rate
23 incentives, we will give them certain other incentives, and
24 all kinds of other bells and whistles to insure that they
25 take our services and take our business. I think that's the

1 context in which it was said. Thank you.

2 MR. COTSORADIS: I thought your conversation was
3 an agreement with weights and measures who inspected the
4 scale. Weights and measures has no desire, or I'm assuming
5 that most weights and measures jurisdictions have no desire
6 in regulating what services you provide, what rates you
7 charge. The only concern is, is the scale accurate? And,
8 it was presented by a UPS representative that because there
9 is an agreement between UPS and this customer, that you're
10 going to get weights and measures to inspect the scale.

11 MR. MORIARTY: We are not saying that anybody, if
12 they have a contract with anybody else, can pre-empt State
13 Weights and Measures. What we're saying is that when a
14 carrier like UPS provides a service and it's not a Mom and
15 Pop-type operation where we showed these other things, that
16 that is where the pre-emption occurs.

17 MR. COTSORADIS: What is the distinction between a
18 Mom and Pop store --

19 MR. MORIARTY: And, that's why we're here today,
20 to talk about --

21 MR. COTSORADIS: -- and a larger one that ships
22 more packages? Is it simply because it ships more packages
23 that you shouldn't disrupt their business? The small Mom
24 and Pop, you can come in and inspect it and yet there's no
25 disruption there?

1 MR. MORIARTY: Well, I think the difference is, at
2 our commercial counters, we are holding out to everybody in
3 the public to walk in and give us a package. We'll weigh
4 the package there and rate it, all right. Now, that's one
5 end of the spectrum.

6 Okay, maybe somewhere in between that is these
7 Mail Box, Etc. and these others that hold out to do that for
8 a larger group of people, and then on the very, very end of
9 that spectrum is this cutting edge, technological services,
10 like UPS Online Professional, that we provide to very large,
11 high volume shippers. And, that, in our mind, there's a
12 distinction as you move that spectrum.

13 MR. COTSORADIS: But, you didn't answer the
14 question. Why does UPS feel that the states are pre-empted
15 in one instance, but not in the other? Aren't the arguments
16 valid across --

17 MR. MORIARTY: Well, you know, we could argue it's
18 pre-empted across the board, but we haven't argued that. I
19 mean, that, basically, is it.

20 MR. RUBIN: Jim, just in the spirit of trying to
21 get on the record the things we heard in the hallway, part
22 of the scenario as I understood it, is it's delivered to
23 large scale customer, and once it's there, there's no
24 regular pattern of calibration when it occurs. Rather, as
25 an individual customer comes to believe that there's a

1 malfunction of some kind with the equipment they have. They
2 call you up and the repairs are made, but that there's no
3 regular pattern in calibration of the equipment that rests
4 with the customer.

5 And, let me just add that, in fact, the actual
6 physical delivery of the equipment to the customer, whether
7 or not the calibration is accurate after physical delivery
8 occurs is not really the -- that's just a question of why a
9 --

10 MR. COLEMAN: Let me say something. I think we're
11 talking about two different things when we talk about
12 calibration and we talk about the accuracy of the device.
13 We're not talking about calibrating a device periodically.
14 We're talking about the inspection for accuracy and other
15 technical requirements. So, it's not necessarily a
16 calibration, but it's a verification of the accuracy.

17 MR. RUBIN: Okay, thank you.

18 MR. MORIARTY: If I could just put in perspective
19 your question, Mike. People are often amazed when they hear
20 that UPS is one of the great success stories largely because
21 of a belief in the integrity of the people here in the
22 United States.

23 They self-weigh their package, all right. They
24 self-bill. They then give us the package and pay us what
25 they say it's worth, all right. If we had more situations

1 like this, things would be a lot better.

2 When we send out these scales, they go to our
3 shippers. If there is a problem with that system or with
4 that scale or anything else, the first call they're going to
5 make is to their UPS representative. They're not going to
6 call a state, they're not going to call NIST, they're going
7 to call us. And, if we don't get that thing the way they
8 want it and if we don't get another one in there -- if they
9 want a color blue or red, pink, whatever they want, we're
10 not going to have their business, so we won't have to worry
11 about the argument of whether this is a service or not, or
12 whether or not there's a role for the states in UPS Online
13 Professional or Maxiship.

14 We deal in a business environment of minutes,
15 that's what we're dealing with. Thank you.

16 MR. UGIANSKY: This is Gil Ugiansky, Office of
17 Weights & Measures, to follow up on Mike's question a little
18 bit and also to get it on the record. One, if you talk
19 about they go there and they change the scale, etc., and
20 it's not right. But, they don't really know if it's
21 weighing accurately, unless there's some system in place.

22 I'd like to go back to my talk a little bit to
23 point out that the founding fathers realized how important
24 it was to have a uniform system of weights and measures in
25 the country so the buyer and seller both knew that they were

1 using the same pound, basically, for an exchange of custody
2 transfer.

3 Our Deputy Director that was in place through most
4 of when this issue was being discussed between us, at one
5 point said to us that Congress has delegated that authority
6 to NIST to determine what the pound is, and we have a
7 sophisticated system through traceability from international
8 standards and down through the states, and it looks like
9 that system falls apart when it gets to the UPS scales.

10 Unless you have state and local inspectors going
11 out there, checking the accuracy of these scales, your
12 customers and you don't even know if you're all using the
13 same standard measurement for determining that weight. And,
14 I would argue that that weight is not your fee structure and
15 it's not a service. You may base your fee on the way you
16 base a lot of other things on, but it's really not that
17 service.

18 How do you swear that the --

19 MR. MORIARTY: I think we'll start, Gil, where you
20 started, and that was with the founders of the Constitution
21 of the United States, all right. They did say what they
22 said, and any time the Congress of the United States acts,
23 it does so with recognition of what the Constitution says
24 and what other laws say.

25 And, in 1994, when they passed that law, they knew

1 what the United States Constitution said, and they knew what
2 NIST is and they presumed to know what everybody else is
3 doing and that is a well-recognized concept. And, I'm not
4 telling you guys anything you don't know.

5 But, in doing that, they said, look, we have got a
6 major problem on our hands here, all right? We've got a lot
7 of regulation, we've got a lot of activities that are
8 impeding the free flow of commerce and they said it's got to
9 stop, and they couldn't have been clearer. But, in saying
10 they had to stop, they were saying, look, states still have
11 a role in safety. States still have a role in household
12 goods and they still have a role in minimum financial
13 responsibility of carriers. They didn't add a fourth clause
14 saying that states still have a role with weights and
15 measures for services provided by these carriers. Thank
16 you.

17 MR. UGIANSKY: I just have to add that they also
18 didn't say that weights and measures is not part of that --
19 I mean, they didn't rule out weights and measures. They
20 didn't say that weights and measures are specifically pre-
21 empted, and, in fact, everybody will be here after lunch
22 from DOT, after the many years of deliberation, they have
23 now ruled that states are not pre-empted in the area of
24 weights and measures. That's not what Congress meant and
25 that's what -- we still believe that.

1 MR. MORIARTY: Sure.

2 MR. WARNLOFF: Everyone here is --

3 MR. COLEMAN: Who are you?

4 MR. WARNLOFF: I'm Ken Warnloff, retired. Fifty
5 years in the business. It would seem to me that for weights
6 and measures, we're concerned about the accuracy of the
7 scale very strongly at General Motors. Your General Motors
8 used to ship parts to Chain Link and Mercury and everybody
9 else. We would recommend to them, and say, hey, why don't
10 you have a system of ascertaining the accuracy of those
11 scales? Why don't you have a serviceman going around with a
12 set of test weights and testing the scale once in awhile?
13 Or, why don't you recommend to General Motors to buy a set
14 of test weights from a recognized weightrometer or whoever
15 and test the scale once in awhile? Then, they can assure
16 the accuracy themselves.

17 UPS is willing to accept that they've given the
18 key to the jailhouse to General Motors and whatever General
19 Motors says, they accept on their basis, or on the basis of
20 their fees. And, if they feel that they don't have to go
21 through a checking system, it's a cost benefit to them of
22 doubting the voracity of General Motors, fine, that's their
23 responsibility.

24 It's their whole livelihood and the livelihood of
25 everybody in that system and all those taxes they pay and

1 all those people. They've got a facilitator and they can do
2 that themselves, just like --

3 Now, if one grocery store is dealing with lines of
4 people and every person that deals in that grocery store has
5 got the same responsibility. When you're talking about,
6 you've only got two people here at the job at UPS and it's a
7 different situation than the front end. They're not arguing
8 about the front end. The front end is for sure talking
9 about the supermarket. They're dealing with the front end
10 of people that are coming into the -- weights and measures.
11 But, not that back room scale.

12 Matter of fact, we've gone through this time and
13 time again. If you go to the back room that isn't public,
14 legally, if they didn't want to cooperate with you, you'd
15 have to get a warrant.

16 MR. ANDERSON: Is it on? Thank you.

17 MR. WARNLOFF: So, the difference is, it's a two-
18 party system and they're not entering into a contract to
19 avoid the -- They're trying to facilitate trades in a way
20 that there isn't -- that's another opinion.

21 MR. MORIARTY: Thank you.

22 MR. ANDERSON: My name is Ross Anderson. I'm from
23 the State of New York. Gil, essentially, I think, put forth
24 my argument against pre-emption strictly on the issue that
25 UPS cannot make up its own pound. It's in competition with

1 other companies who are using a pound, who are using
2 dimensional formulas involving linear measure and basically,
3 I can't see that Congress would have given UPS or any
4 shipper the authority to make up their own system of weights
5 and measures. And, that's essentially our argument against
6 the pre-emption.

7 I would like to also point out, I thought it was
8 interesting that you pointed out that we always think about
9 people being regulated for giving short measure and being
10 prohibited. But, I think it's interesting that my state law
11 also prohibits the buyer from taking more. So, the person
12 who is using your service, if they cheat you, they are
13 subject to my regulation.

14 So, in a sense, you know, ours is very clearly
15 protecting both sides. The other point that I think is so
16 important here is, just because we have authority doesn't
17 mean we use it. I think many states are faced with
18 decisions of priorities and I think what Constantine was
19 trying to point out, what is the difference between this
20 system and the customer counter? There's no difference.
21 It's a transaction between one party and another party.
22 It's my planning that on the basis of commerce and
23 protecting the accuracy of commerce in terms of weights and
24 measures only, again, as Gil pointed out, this is not a
25 service issue. This is a matter of someone is saying this

1 is two ounce shipping weight. We have every authority under
2 our statutes to be there and to regulate that.

3 Now, that doesn't mean we're going to be there on
4 every one of these. In fact, if you start to think about
5 it, if we're going to go into General Motors and check their
6 shipping scale, there are 14,000 other businesses who ship
7 stuff UPS and have pick ups at their back door. There's
8 just no way that weights and measures can physically do
9 that. It's just not realistic when you look at the numbers.

10 But, what I want to say, though, is we're not pre-
11 empted from being there. We're just not there because we
12 don't have the manpower to do it. And, I want to, you know,
13 basically say that I agree 100 percent with what Gil was
14 saying. You cannot make up your own pound, and that applies
15 to General Motors, as well. In other words, if he goes in
16 and adjusts that scale to give you an accurate weight, he's
17 subject to our regulation just as much as you are.

18 MR. MORIARTY: Okay.

19 MR. ANDERSON: And, I certainly think that the
20 honesty issue does play itself out, but basically, we have
21 the power to protect both sides and it's just a matter of
22 how we intend to use that.

23 MR. MORIARTY: If I could, Tom? I'd like to
24 correct what I said. That's Jim Dann from DOT walking in.
25 The only thing I say is, I don't want anybody to leave this

1 building thinking UPS is trying to create a competitive
2 weights and measures system that we're going to market for
3 states or to anybody else and displace what's there now.

4 And, just a comment on your authority to protect
5 us if a shipper is taking more than he should. We have
6 found that in dealing with our customers, getting more
7 business from them -- it's not conducive to getting more
8 business from them, you know, turning them into a state,
9 basically, and saying, you know, they've been taking more.
10 I mean, we try to deal with that in the marketplace, but I
11 do appreciate your comments on manpower and other type of
12 things and that's what we're talking about.

13 MR. COLEMAN: Any other comments?

14 MR. UGIANSKY: Gil Ugiansky, again, Office of
15 Weights & Measures. I'll get off real soon. The argument
16 here is a process argument. We have a contract with a
17 customer and we're okay with it, so we should trust each
18 other and they should trust us.

19 I just want to then go back to my thought and one
20 of the things that I talked about was the Milk Study. We've
21 done -- we and other federal agencies and the state and
22 local weights and measures jurisdictions have done several
23 studies national or more local than that and point out that
24 in areas where weights and measures haven't been extremely
25 active, very active, almost every time that we do a study,

1 we find large problems. In some of the states that were
2 regularly checking milk, that were regularly checking milk
3 at grocery stores, it was more accurate in the grocery
4 stores and if they weren't checking the schools, it was less
5 accurate in the schools and vice versa.

6 I know in Maryland, the State of Maryland was very
7 active in the grocery stores and then found that there were
8 problems in the schools at one point and shifted their
9 staff, basically, to do more checking on milk in schools.
10 And, so, when we did the study, the accuracy of milk in
11 grocery stores had fallen off a little, if that's correct,
12 or maybe it was the other way around.

13 But, the point is that if weights and measures
14 isn't in there actively making sure that we're using the
15 same pound, things tend to drift. And, I'm not saying it's
16 intentional, but things drift and you don't have uniformity,
17 you don't have a common method of exchange of custody
18 transfer, basically.

19 MR. MORIARTY: Gil, I think really what we're
20 talking about, and someone made this point earlier, is
21 weighing the cost and effect of what's going on here. You
22 know, these are 65,000, 70,000 of our 1.6 million per day
23 customers. We have found that we provide a tremendous
24 service. We rely on the integrity of our customers.

25 I know the milk thing is a very important thing.

1 I mean, it's an \$8 billion market. But, in a business world
2 and in a state world, and increasingly, in a federal world,
3 we need to look at the savings of \$17 million or \$170
4 million in an \$8 billion problem. I mean, we really do.

5 And, we are nowhere near talking about something
6 like that, and we don't want to start talking about
7 something like that. We are here to discuss where you guys
8 are coming from and where we are, and hopefully, where we
9 need to go. Thank you.

10 MR. COTSORADIS: This is Constantine Cotsoradis.
11 Thinking in terms of UPS and the customer, but there's a
12 third party, too, that is involved, which is the competitor
13 of the customer, who may also be a UPS customer. I believe
14 that -- . Instances where people are. Recently in
15 California, they uncovered a big operation in gas stations,
16 where they went to elaborate means to short customers on
17 gasoline. A few years back, or 13 years back, a major juice
18 company was selling water to babies instead of apple juice.
19 So, there aren't, unfortunately --

20 MR. MORIARTY: Well, first of all, I immediately
21 reject any comparison of UPS to people not selling adequate
22 apple juice to babies. I immediately reject that. And, I
23 immediately reject any comparison to everybody pulling up to
24 a gas station and getting a gallon of gas. That's not what
25 we're talking about, Constantine.

1 MR. COTSORADIS: It's not to compare you. It's to
2 point that, unfortunately, while we depend upon the
3 integrity and honesty of people, sometimes we're
4 disappointed that there are dishonest people.

5 So, we have a customer who is shipping UPS.
6 They're responsible for determining their own weights. You
7 said earlier that one pain takes away a -- and gives it to
8 the customer. So, obviously, a pain means something to
9 these businesses. If a business is dishonest, lowers the
10 rates, reduces their shipping costs, they had an unfair
11 advantage to a competitor in a similar business who is
12 honest and is using standard weights. So, that's another
13 reason that weights and measures should be involved. It's
14 not just to protect UPS. It's not to protect the customers.
15 It's to insure equity in the marketplace.

16 MR. MORIARTY: The great State of New Jersey.

17 MR. HUMPHREY: Alan Humphrey, weights and measures
18 in New Jersey. New Jersey has a registration policy where
19 all commercial weights and measures has to be registered and
20 a fee has to be paid. It's our understanding that UPS
21 claims an exemption for the fee in the State of New Jersey.
22 Is that the position that they take?

23 MR. MORIARTY: I think we've been in conversations
24 with the Attorney General's Office of New Jersey and our
25 position is that the registration, licensing and fees for

1 UPS Online Professional systems, sorry, I know we want to
2 get this on the record -- I don't think they want to hear
3 it, anyway.

4 But, as I said, we were having conversations,
5 still having conversations with the State of New Jersey, but
6 our position is that licensing and fees having to do with
7 UPS Online Professionals are pre-empted.

8 MR. CARROLL: Charles Carroll, Commonwealth of
9 Mass. We have historically treated the storefront operation
10 as a commercial device. It's a no-brainer as far as we're
11 concerned. It's open to the general public, and certainly,
12 those scales are considered commercial devices under our
13 state law and have to meet the requirements in 24.

14 When it came to a business shipping scale, if we
15 were in the plant to do some work or we were called in, then
16 we would test that device. But, we always treated it the
17 same as some states do with the packaging scale in the back
18 room. They don't consider that a commercial device and
19 that's the way it's been treated in that state for a number
20 of years.

21 MR. UGIANSKY: And, I think that's consistent with
22 our view of the way things are.

23 MR. CARROLL: Thank you.

24 MR. MORIARTY: Any other questions?

25 MR. COLEMAN: I know I'm hungry. I don't know

1 about anybody else.

2 MR. RUBIN: Well, basically, I know that Jim Dann
3 has arrived and I wanted to take an opportunity just on my
4 own behalf personally to thank both Jim Moriarty and Jim
5 Dann for participating in this activity, their graciousness
6 in participating and their corporate good citizenship in
7 come and talking them through.

8 I think we're in a very good process here. I'm
9 sure we're going to come to a good conclusion and I want to
10 thank everyone involved in the process.

11 MR. MORIARTY: Thank you, Mike.

12 MR. DANN: You haven't heard my speech yet.

13 (Laughter.)

14 MR. COLEMAN: Anymore questions? Again, I think
15 we've had a very good morning, after we got by the glitch of
16 the speakers and a few other things. But, it's getting
17 better. Let's take a break until one o'clock, at which time
18 we'll come back and listen to Jim Dann and DOT's
19 representation of the Federal Aviation Administration Act.

20 (Whereupon, at 11:45 a.m., the hearing was
21 recessed, to reconvene at 1:00 p.m. this same day, Thursday,
22 June 3, 1999.)

23

24

25

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1 empts state weights and measures enforcement over United
2 Parcel Service Maxiship and Online Professional Services.
3 And, he said, keep it light.

4 (Laughter.)

5 MR. DANN: So, I will try and keep it light. I
6 gather that not many of you are attorneys and frankly,
7 standing up here and trying to distinguish cases and parse
8 sentences and so forth, it's boring enough for us lawyers to
9 do, so I'm not going to try and do that. We'll do an
10 overview of this statute, talk a little bit about what it
11 was designed to do and then go into an opinion that our
12 office has just issued on the subject of what impact we
13 think at DOT this would have on the UPS services.

14 I spoke to my colleague as well for any additional
15 advice, and he told me the story of the last time he spoke
16 after lunch. He said it was going along pretty well until
17 he noticed a fellow in the back row had fallen asleep. That
18 was okay, but after awhile, the fellow started to snore, and
19 he snored louder and louder and louder. And, finally,
20 nobody was paying attention to him, everybody was listening
21 to this fellow snore. And, he said, could you wake that
22 fellow up in the back row? And, the answer was, you put him
23 to sleep, you wake him up.

24 (Laughter.)

25 MR. DANN: So, I will try and keep it light. The

1 reason that I am here from DOT, we have an office policy of
2 sort of rotating speaking assignments, so that nobody gets
3 advantaged or disadvantaged. There's only one other fellow
4 that works in this area. He had the last speech. He went
5 in March for a week to Palm Springs, California, so I'm real
6 glad to be here in Gaithersburg today.

7 I asked the boss if there was an per diem that I
8 would be eligible for, and she said that she was very
9 familiar with Gaithersburg and recommended a deli downtown,
10 where you can get a sandwich for three and a quarter that
11 would cost four and a quarter in D.C. and I should go there
12 for lunch. And, to make a long story short, I not only got
13 per diem denied, but I owe her a buck when I get back.

14 There is substance to this speech. I think all of
15 our lives are probably a little bit easier prior to August
16 24, 1994. It was on that day that Congress enacted the
17 provision that you've been talking about, I understand, at
18 some length this morning. That provision, as you know,
19 generally pre-empts states from enacting laws or enforcing
20 those laws related to a price route or service of a motor
21 carrier with respect to the transportation of property.

22 Now, where did this law come from? What was
23 Congress thinking when it enacted this provision? The
24 background, too, is that Congress, in 1980, had deregulated
25 most of interstate motor carrier regulation.

1 Notwithstanding that there were still, by 1994, there were
2 still 42 states that have their own regulatory regimes,
3 things like restricting entry of new firms. You had to go
4 through a detailed process, you had to get certified, so on
5 and so forth. Rates and routes were also restricted by
6 those states, and there was a fair outcry from the trucking
7 industry that what Congress had tried to do in 1980 was
8 largely being undone as a result of state regulation.

9 Truckers were complaining of inefficiencies, the
10 matter was turned over to the Department of Transportation
11 to study and we did a fixed study that indicated that about
12 \$3 or \$4 billion could be saved, savings passed onto
13 consumers, if these conflicting, often, state laws were pre-
14 empted.

15 There was also an interesting story -- I don't
16 know if Jim got into this, Jim Moriarty got into this this
17 morning -- but, Congress had, in 1978, deregulated the
18 airline industry with a very similar provision. You can
19 look at the two and most of the words just line up together.
20 Federal Express, probably as you know, is a major competitor
21 of UPS, and is an air carrier. Most of its operations are
22 more on the air side than the ground side. UPS is more the
23 ground side than the air side, if I understand. But, Fed Ex
24 was very aggressive in pushing in the Courts an
25 interpretation of the Airline Deregulation Act that would

1 have extended the benefits of that deregulation to its motor
2 carrier operations. And, it largely succeeded in doing
3 that.

4 The competitors of Fed Ex now found some of Fed
5 Ex's activities beyond state control, while they were still
6 subject to state control. And, Congress looked at leveling
7 the playing field, understandably so. UPS and others were
8 very active in promoting a provision that does what this
9 provision does.

10 Now, how did Congress act? You would think there
11 was a fair amount of publicity at this time. This was
12 considered a major step. You're affecting 42 states and
13 their activities. You would think you would have extensive
14 hearings and a full ventilation of all the issues involved
15 here. In fact, Congress was fairly confident that in
16 choosing the words back in 1978 for the Airline Deregulation
17 Act, that they had it about right. And, so, this
18 provision, very similar to the aviation dereg provision, was
19 simply sort of attached onto the FAAA AA Act in '94, without
20 the benefit of very extensive hearings, conference
21 committees and all the rest of this at this time.

22 Would we have profited from a greater ventilation
23 of views at that time? I think so. I think in retrospect,
24 that's very much the case. States could have come in with
25 their various programs, argued, tinkered with the language

1 and so forth, and we would have gotten something a little
2 bit better, a little bit more specific, than what we have
3 now. The immediate issue became tow trucks, of all things.

4 I mean, Congress is saying, all right, we're going to dereg
5 motor carriers like we deregged the aviation industry.
6 They're pretty similar, aren't they?

7 Well, you don't have tow airplanes, or at least
8 not very many of them, and so states and localities that had
9 very traditionally regulated the tow truck industry, saying,
10 all right, you cannot charge more than \$60 for a ten-mile
11 tow. You have to store the towed vehicles properly, you
12 have limitations on storage fees, all these kinds of things,
13 suddenly found themselves being challenged by the tow truck
14 industry. This was something that Congress had overlooked.

15 Congress did go back and fix about 75 percent of
16 the problem. We had an amendment to this provision
17 specifically to exempt consensual tow truck operations.
18 But, without the benefit -- I mean, that's one example --
19 without the benefit of a full ventilation, we are stuck sort
20 of where we are with this provision, trying to interpret it
21 based upon our reading of the language that Congress gave
22 us, what their intent was at the time, and employing all the
23 tricks that lawyers do in trying to interpret what a federal
24 statute really means.

25 One immediate question, some states were not very

1 happy, by the way, with this law. There was an almost
2 immediate constitutional challenge to it. Oklahoma took the
3 -- do we have someone from Oklahoma here? That's probably
4 why. They took it right to Court and found the 10th Circuit
5 Court of Appeals, Federal Court, agreeing that this law was
6 constitutional, that this was a legitimate exercise of
7 federal authority to pre-empt states from enforcing state
8 laws on this segment of the industry.

9 Now, I guess about that time, some questions
10 started arising from the weights and measures perspective.
11 And, from what we could gather, those questions started
12 coming to NIST and NIST made a big mistake. They thought we
13 at DOT would know something about this, so they asked us for
14 our opinion.

15 (Laughter.)

16 MR. DANN: And, maybe a sidelight. I work in the
17 General Counsel's Office at DOT. There are six lawyers. We
18 do all the patent and copyright law for the Department, the
19 bankruptcy law for the Department, most of the environmental
20 work for the Department, a lot of the aviation work for the
21 Department, security stuff, maritime issues, airport
22 property issues. But, one time, long ago, one of the
23 lawyers had done an aviation pre-emption case, and he listed
24 among his specialties pre-emption. And, so, you know the
25 commercial about Mikey eating the cereal? This question was

1 given to us to resolve.

2 In all honesty, we didn't really have much in the
3 way of resources to devote to this kind of issue, especially
4 one that we were not right on top of. Had this come from a
5 private party, we would simply have explained that we don't
6 have the resources to try to resolve this. But, this was a
7 request from another federal agency and we took it very
8 seriously and decided we're going to do this. I wish we
9 could have given a higher priority to it and got it done
10 quicker, but we had our own clients banging on the door.
11 So, this one sort of was in the category of things we wanted
12 to do and were going to get done, but didn't get done as
13 quickly as we would have hoped.

14 So, what does this opinion say? Let me pass this
15 out. I will take you through it a little bit, and as it's
16 passed out, remember again the words of the statute, "states
17 and political subdivisions". So, those of you who are from
18 counties, and I see that there's a number of counties here,
19 you're included in all this, with a couple of exceptions.
20 "May not enact or enforce laws or regulations --" important
21 words -- "...related to a price, route or service of any
22 motor carrier with respect to the transportation of
23 property."

24 This opinion goes on to talk about what we
25 understand the state role is, or we understand the county

1 roles are, what we understand the NIST role is. We talked
2 about what we understand is involved in the UPS Online
3 Professional and Maxiship services and then focus on what is
4 the test? How do you test pre-emption?

5 Now, you'll recall my mentioning that we had
6 similar language in deregulating the airline industry. And,
7 so, some of the Court efforts to give us guidance in this
8 area came from aviation cases. I don't want to get too much
9 into detail in these cases, but the first one is a good
10 example. This was an effort by the states' Attorney
11 Generals to regulate airline advertising. You all see the
12 ads in the paper for \$99 fares. The deception, there is a
13 great potential for deception in these kinds of activities.

14 Is it round-trip, is it one-way? What are the restrictions
15 on it? They don't tell you in the fine print what are the
16 restrictions on those flights. It might have been two seats
17 available at that price, gee, if you called yesterday. So,
18 states were, understandably, perhaps, interested in
19 regulating airline advertising.

20 And, our position at DOT was, in that situation,
21 we lined up sort of with the industry. This is a situation
22 in which there were conceivably 50 states having different
23 rules. We thought we could do a better job, and we do. We
24 have a large office that is dedicated to resolving exactly
25 these kinds of problems on a uniform, national basis. So,

1 we said, sorry, we think this is pre-empted. That went to
2 the Supreme Court and the Federal Government's view did
3 prevail, that states could not regulate airline advertising.

4 When the Supreme Court looked at that case, they
5 focused on the words related to. That's the key language
6 here, is the state activity, related to rates, routes and
7 services. And, they looked at those words and they read
8 them broadly, and they said, sure, in this case, there is a
9 relationship between state advertising rules and the rates,
10 routes and services of the airline carriers.

11 So, I don't think it was a hard case for them, but
12 that's how it sort of went down. There was a subsequent
13 case called Rollins dealing with frequent flyer
14 restrictions, pretty much the same kind of approach.

15 It was about this time that the first case came
16 through a state or local activity specifically involving UPS
17 activities and weights and measures. This was a case that
18 came to D.C., District of Columbia. There is a Department
19 of Consumer and Regulatory Affairs there and an attorney
20 examiner looked at UPS' case, looked at these two Supreme
21 Court cases, and said, we see, in D.C., a relationship
22 between what the District is trying to do with respect to
23 weights and measures enforcement and the services that UPS
24 is providing.

25 And, so, they said in D.C., good news for UPS, bad

1 news for the states or the District, that this enforcement
2 activity was pre-empted by the federal statute.

3 When we at the Department continued our research,
4 we found that there has been a law made since those two
5 cases, since the Morales case and the Rollins case. Both of
6 those cases involved sort of traditional state enforcement
7 programs. For example, the state prevailing wage laws are a
8 very common-type thing, where a state says, if you want to
9 work on a state contract or with the state in some fashion,
10 you will have to pay prevailing wages, whatever is
11 prevailing in the community. If you're going to work for
12 us, we don't want scab labor, in effect, working for us.

13 And, these cases, the Supreme Court focused a
14 little bit more not just on whether there was a relation,
15 but what was the nature of that relationship? How far did
16 the state regulation go? Was it direct, was it indirect?
17 They had saved some ground in these earlier cases by saying,
18 well, we're addressing the issues that we've got here, and,
19 you know, maybe there's a more indirect case out there.
20 That's certainly possible. But, in these latter two cases
21 involving Blue Cross and Blue Shield plans and a company
22 called Dillingham, the Supreme Court went on to say that you
23 look, again, at the extent of the relationship. You look at
24 the opinion, and you can almost read along with me.

25 I'm on page four of this thing, the end of the

1 first paragraph. If you've got lawyers back home that you
2 want to show this to, this is a key sentence. This is the
3 end, again, of the first paragraph on four. "As we read
4 Morales, Rollins and these cases, the test is not simply
5 whether regulation of weights and measures relates to UPS'
6 rate, routes or services, but whether any such relationship
7 that may exist is, on one hand, indirect, remote, tenuous or
8 peripheral, or, on the other hand, direct, or one that has
9 an acute economic effect." The hardest part here is finding
10 out what test are we going to use in looking at these kinds
11 of cases.

12 And, so, again, if you'd look at the relationship,
13 we think, and it's one that's indirect, that's remote,
14 that's tenuous, then it would not be pre-empted. But, if
15 it's a direct relationship and -- or -- not and, but or, if
16 it has an acute economic effect on the industry, then it
17 would be pre-empted. And, so, we went through and based on
18 our understanding of how Maxiship works and how Professional
19 Online works, we looked at it and we concluded that this was
20 more in the indirect, the remote situation, than the direct
21 or acute economic effect situation.

22 It was our understanding that, number one, this is
23 certainly a traditional state activity. It's been around a
24 long time, that the imposition, the incursion, the
25 interference is fairly limited. It's probably 15, 20

1 minutes for a standard test. That's a long bathroom break,
2 at least in the Government.

3 We looked at competitive effects. We couldn't
4 quite find any real competitive effects, and this was the
5 conclusion that we reached. And, so, our conclusion is on
6 the first full paragraph on five. Again, you're going to
7 take this home and give it to your lawyers. "We conclude
8 that under the facts as understood and related above, the
9 effect of state enforcement of uniform national standards of
10 weights and measures upon UPS Services is not direct, nor
11 are its economic impacts acute. Rather, we believe that
12 such effect is too tenuous, remote and indirect to be pre-
13 empted by the FAAA AA Act."

14 Having concluded all this, let me express some
15 cautions. Do not take this opinion back to your lawyers and
16 say, we can do anything we want. This is a dynamic and
17 evolving area of law. There are going to be additional
18 cases. They may not be UPS cases, they may not be motor
19 carrier cases, they might be aviation cases, but we will
20 continue to see cases on point coming down. Again, if we
21 had stopped with D.C. back a couple of years ago, we may
22 have well concluded very differently. So, the law is
23 evolving.

24 Secondly, this is almost the worst kind of law to
25 practice. It's a question of when does direct become

1 indirect, how much tenuous is enough, when are economic
2 impacts acute. This is a little bit like, you know, you're
3 sort of walking along like this. When do you cross the
4 line? We're trying to apply, unfortunately, a black and
5 white, is it pre-empted or not pre-empted, test on something
6 that's really a spectrum of activity.

7 You can go from a very benign kind of regulation,
8 a stop sign. Is that impacting the operations of a motor
9 carrier? I suppose you could argue that if you wanted to,
10 but that's pretty remote and tenuous. That's all the way on
11 this side of the spectrum.

12 On the other hand, I am sure that Jim can argue
13 that what's on the other end of the spectrum, where the
14 interference would be more substantial, where the impacts
15 would be more direct. We have only looked in this opinion
16 at Maxiship and Online Professional. Where that line would
17 be drawn with respect to other types of services, we have to
18 do that on a case by case basis -- a very difficult area of
19 law, conceptually, to work with.

20 And, I guess a third caution would be, I thought
21 that in listening to UPS' views, that one of the more
22 compelling arguments was that their activities were not
23 really impacting on consumers. This was a no-harm type
24 situation, and perhaps there was no necessity for states to
25 become involved in weights and measures enforcement of these

1 kinds of systems.

2 We chose in this opinion not to get into that. We
3 have enough difficulty doing our own business without trying
4 to decide for NIST and the states matters we think are
5 within your discretion. If these are things that have no
6 victim, where consumers are not disadvantaged, you all can
7 be the ones to decide that your resources are better spent
8 someplace else. That is not for the Department of
9 Transportation to get involved in. So, we set that one
10 aside.

11 Again, these are areas in which we have to respect
12 the opinions of others. If you had ten different lawyers
13 and ten different judges trying to draw that line, they'd
14 probably draw them in ten different places. And, we can
15 only tell you where we at DOT think the line would be drawn
16 with respect to these services.

17 In closing, in preparing for this, I thought of a
18 passage from a poem. I am not a very cultural guy. My wife
19 will tell you, my idea of high culture is a bad hockey game.

20 But, I think I learned this back in high school or
21 something, and I was taken by it. It's a poem by Steven
22 Vincent B'nai, called "John Brown's Body," and it's a poem
23 about John Brown, the individual who led the slave revolt
24 prior to the Civil War and, in some ways, brought that
25 conflict closer.

1 And, B'nai's point is that the law is very good at
2 objective things. You can measure John Brown's body. But,
3 not very good at subjective things, like John Brown's soul.

4 And, so, B'nai says, "No one can say that the trial was not
5 fair. The trial is fair, painfully fair by every rule of
6 law. And, then it was made not the slightest difference.
7 The law's our yardstick and it measures well or well enough
8 when there are yards to measure. Measure a wave with it,
9 measure a fire, cut sorrow off in inches, weigh content.
10 You can weigh John Brown's body well enough, but how and
11 what balance weigh John Brown?"

12 With apologies to B'nai, he thought it would be
13 pretty easy to do this case, and I think the guy is wrong.
14 I think it's pretty hard to do this case. Even the
15 objective weights and measures kinds of activities are not
16 easy ones to use. That's my close. I'd be happy to take
17 questions, if there's time for them? More jokes?

18 MR. HUMPHREY: Tom, just a question.

19 MR. DANN: Sure.

20 MR. HUMPHREY: Will the Department of
21 Transportation go any further with this, or it's up to the
22 Courts now, or do we just let it lay molded in the grave?

23 MR. DANN: That's a good question. That's an
24 excellent question. I'm not sure I have the answer to that.
25 I think it depends in large part upon what folks like UPS

1 decide they want to do with this law, and what the states
2 decide they want to do with this law.

3 We don't bring cases customarily at DOT. As I
4 say, this particular thing was a little bit outside the
5 mainstream of our activities. You know, if we can help in
6 some further fashion with an additional requirement later
7 on, I think I can say we'd be happy to do that, if we have
8 the resources to do it. But, I don't think a final answer
9 to this question resides with the Department of
10 Transportation.

11 MR. COLEMAN: Thank you, Jim.

12 (Multiple voices.)

13 MR. COLEMAN: Steve Malone is going to come up
14 here in just a minute and do something I always wanted to
15 do, explain Handbook 44 in 45 minutes.

16 (Multiple voices.)

17 MR. COLEMAN: So, without further ado, I can turn
18 out the lights. I can do that, Steve.

19 (Pause.)

20 MR. MALONE: Well, Tom has given me a pretty good
21 task to do in 45 minutes, talk to you about Handbook 44.
22 First, my name is Steve Malone. I'm with the Nebraska
23 Department of Agriculture and I'm a weights and measures
24 official. Some of you I know and some of you I don't, but
25 my assignment is to talk about Handbook 44 and the National

1 Type Evaluation Program. And, to do that, I think I want to
2 start back a little bit, maybe, and talk about this
3 morning's session just a little bit, and talk about weights
4 and measures in the U.S.

5 And, I think we heard this morning that it's
6 pretty clear that weights and measures is a function of
7 state and local governments in the United States. It's a
8 local function, and there are 756 jurisdictions in the
9 Congress, that's a kind of review for this morning. To me,
10 that presents a lot of concern. If you have that many
11 jurisdictions, you probably have about that many ways of
12 doing things. Uniformity becomes a real concern in the
13 process.

14 And, you heard a little bit about the National
15 Conference this morning, but the National Conference has
16 developed some standards that are published by the National
17 Institute of Standards & Technology in Handbook 44, which
18 sets up specifications and tolerances for devices. We have
19 Handbook 130 that sets out the model law and model
20 regulations that these 756 jurisdictions can adopt, and then
21 this Handbook 133 develops some testing procedures that the
22 jurisdictions can follow in examining prepackaged
23 commodities to assure that they contain what is represented.

24 We're going to talk about this Handbook 44,
25 Specifications and Tolerances and Other Technical

1 Requirements for Weighing and Measuring Devices. The
2 targeting of the device if employed in a commercial
3 application to me seems to be a key determination if the
4 device should be regulated. And, this is kind of the
5 subject with the shipping-type scales, that seems to be a
6 real question and where is that point. I'm not sure I'm
7 going to answer that for you, but I do want to talk about
8 how Handbook 44 applies to commercial equipment.

9 Okay, latest industry devices or commercial
10 equipment, if they're used or employed in establishing size,
11 quantity, extent, area, measurement or quantities of things,
12 premiums or articles for distribution, consumption,
13 purchase, offer, or submitted for sale, higher award or
14 implicating any charge or payment for services rendered on
15 the basis of weight or measures. Now, that's found in
16 Handbook 44 and it's also found in a lot of state laws and
17 regulations. So, basically, this is the definition for a
18 commercial device. And, for the subject that we're talking
19 about today, I think the last sentence probably makes it
20 fairly clear that these devices are certainly determining a
21 quantity on which a service is being based.

22 Handbook 44 is nothing more than a model standard
23 for commercial and law enforcement equipment to meet. But,
24 this standard is adopted by all 50 of the states and their
25 local jurisdictions. It's also referenced by many federal

1 regulations, including U.S. Department of Agriculture
2 requirements, FDA and FTC. I'm too fast for this thing.

3 Okay, the handbook also provides guidance to
4 device manufacturers, in giving them specific requirements
5 that they must meet when they manufacture a commercial piece
6 of equipment. They had also given information to the device
7 user on how they can apply and use that piece of equipment
8 in commercial practice. It also provides other information
9 to other interested parties. I think it's important to
10 realize, I think there was a slide this morning, that
11 there's some 50,000 registered service persons that work on
12 these commercial pieces of equipment, or service
13 individuals. And, this document provides the guidance for
14 them to know what performance requirements they have to meet
15 to put that piece of equipment into service, or back into
16 service after it's been taken out.

17 These aren't really too new of standards. In
18 1915, the NCWM adopted the first set of device
19 specifications and tolerances. I don't think it was called
20 Handbook 44 -- probably Handbook 1 -- but it's been around a
21 long time.

22 How are the standards developed? For those of you
23 that may not be involved in the National Conference or
24 familiar with it, we will go through it a little bit.
25 Through the work of the NCWM Specifications and Tolerance

1 Committee -- it's a small committee made up of five
2 regulatory officials -- there is some representation as
3 advisors, through the technical advisors of NIST that sit on
4 that committee. The committee works with device
5 specifications and tolerances and user requirements, and it
6 receives proposals to amend Handbook 44, or this document.

7 Normally, during the fall of the year, the
8 committee will receive proposals from individuals. They can
9 be from states or local jurisdictions. They can be regions,
10 they can be device manufacturer, or actually any place.
11 They can receive comments on proposals to change the
12 specifications and the tolerances in Handbook 44. And, in
13 January, during the interim meeting of the National
14 Conference, the Specifications and Tolerance Committee holds
15 public hearings to discuss the proposals that they received
16 and to take comments from the public.

17 After the interim meeting, the committee develops
18 a report of their recommendations to present to the
19 conference as a whole, and that's published in a document
20 called NCWM Publication 16, which is really nothing more
21 than a set of proposals that are being presented to the
22 conference for review and consideration.

23 In July of each year, the National Conference
24 holds an annual meeting and, again, the Specifications and
25 Tolerance Committee holds an open, public hearing to discuss

1 the proposals that were submitted or presented in
2 Publication 16, and during that time, they will take
3 testimony and they can possibly amend their report during
4 that period. But, in July, at the annual meeting, they'll
5 finally present the items for vote to the active membership
6 of the conference. We haven't talked a whole lot about the
7 membership of the conference, but the active membership are
8 the regulatory officials that have the ability to vote on
9 these specifications or changes to Handbook 44.

10 Anyone that's a member of the conference or
11 attends the conference can participate in the discussion,
12 but only active members have a vote. The changes, then,
13 that are adopted in July become effective on January 1 of
14 the following year, and I think it's important to note that
15 these changes, in many jurisdictions, are adopted by
16 reference. There is no further action required in many of
17 the jurisdictions, other than the adoption of these things
18 by the conference. They're automatically adopted in many of
19 the state and local jurisdictions. So, these things become
20 basically law.

21 Let's look at Handbook 44 structure, a little bit,
22 if we can. Handbook 44 first is set up into codes. The
23 documents consist of first a general code, which has
24 specific requirements that apply to all types of devices, in
25 general. Then it has a code for scales with measuring

1 devices, one for measures, a code for linear and moisture
2 devices and the pendencies.

3 Each one of the codes is divided into sections.
4 These sections include first the application section, which
5 tells the reader of that document what did this particular
6 code apply to, or what does it not apply to? Then we have a
7 section called specifications, which tells basically the
8 manufacturer that these are the requirements that you must
9 meet when you build and design this device, so it can become
10 a commercial piece of equipment, as well as it tells the
11 regulator what components this piece of equipment must have.

12 The notes section provides the individual who will
13 be testing or servicing this piece of equipment the proper
14 procedures that he needs to follow, he or she needs to
15 follow when testing the piece of equipment. There's a
16 tolerance section that basically tells these are the
17 performance levels this device must meet at different
18 stages. Then we have a set of user requirements for the
19 people who actually operate this equipment, telling them the
20 things that they have to do if they want to use that device
21 in a commercial application.

22 Handbook 44 talks about accuracy and we talked a
23 little bit this morning about accuracy. And, accuracy, to
24 me, is merely a performance requirement. Can the device
25 perform within a given range? But, always, the measures

1 officials are going to expect a device to be correct. A
2 device can be accurate, but it may not be correct. Correct
3 means that performance is appropriate, and it also meets
4 these specifications that are required in the handbook and
5 it meets the user's requirements and any other requirement
6 that jurisdiction may have with respect to the performance
7 and accuracy of that piece of equipment.

8 Well, I think it's important for those of you that
9 may not be weights and measures people to understand the
10 theory of tolerance, because that's kind of -- there's a
11 thread that runs through all this discussion, I guess, when
12 we think about tolerance. First off, no device is perfect.

13 I think we all understand that. We could probably make of
14 them that was perfect, but I'm not sure that we could ever
15 afford it. Tolerance has fixed the allowable limits of the
16 device performance. Tolerances are sufficiently small that
17 no serious injury occurs to any of the parties involved in
18 the transaction, and the equipment is good enough but not
19 unreasonably costly. So, the tolerances developed for
20 Handbook 44 had to meet all that criteria. And, I think
21 that's really a key set of factors when you think about
22 Handbook 44 and the necessity of the document.

23 Weights and measures officials employed Handbook
24 44 as a tool that achieved equity in the marketplace. They
25 had to have that standard to do it. I mean, if we were

1 running around without that document, trying to test these
2 certified devices, I think we'd be in deep trouble.
3 Remember, we had 756 jurisdictions.

4 Well, this kind of leads me into the National Type
5 Evaluation Program. NTEP is a program for device
6 manufacturers to submit equipment to evaluate that equipment
7 in the Handbook 44 requirements. This is kind of like, I
8 guess, the easiest way for me to explain it is it gives the
9 device manufacturer an opportunity to send their piece of
10 equipment in so an independent party is going to look at
11 that piece of equipment and say, yes, it complies with
12 Handbook 44 before I spend all the time and effort and money
13 to put it in the marketplace, and find out that it doesn't
14 comply.

15 The objectives of the National Type Evaluation
16 Program are to establish a uniform set of criteria and test
17 procedures for evaluating commercial devices. It's a system
18 in which one evaluation satisfies all the states and
19 provides at a minimum, of assuring the weights and measures
20 official the device is capable of meeting Handbook 44. It
21 provides weights and measures for perspective device
22 purchasers with a list of devices found to comply with
23 Handbook 44, based upon the evaluations.

24 Let me talk to you a little bit about, give you a
25 little background on NTEP and how it all got started. The

1 first thing I have up here, it says it started, was
2 established in 1984. That's actually the date, I guess,
3 that the Conference adopted the document or we said we had
4 this program. But, actually, it's probably about eight
5 years prior to that that there was a task force started to
6 work on development of a National Type Evaluation Program,
7 and the reason being was there were about 17 jurisdictions
8 in the country that had their own evaluation programs.

9 So, the device manufacturer possibly could end up
10 submitting their device in 17 different jurisdictions to
11 have the same type of test performed on that device before
12 they could sell it in that jurisdiction. So, the idea
13 behind the National Type Evaluation Program was to have one
14 place where the manufacturer could then go and everybody
15 would accept that test.

16 Adopting the program among manufacturers, users
17 and weights and measures officials. This thing was
18 developed by those parties. It's not a one-sided approach
19 in the development of NTEP. The program promotes uniformity
20 of type evaluation and interpretation of the handbooks.
21 There's one set of individuals that are trying to interpret
22 and write the checklist and the different procedures for the
23 evaluations of these devices, not 17 other groups. It's a
24 single evaluation to satisfy those dates. I think I covered
25 that.

1 Enables testing not particularly, not practical in
2 the field. In other words, temperature testing is very
3 difficult for a field application, unless you're willing to
4 come back to that device on many different kinds of control,
5 try to control the temperature. You know, in a laboratory,
6 you can control the temperature and you do these tests and
7 it's sort of a rapid process.

8 The program is managed by the National Institute
9 of Standards and Technologies, Office of Weights & Measures.

10 It's a "voluntary" program, and we put that in quotes
11 because I'd like to say it's a voluntary/mandatory program
12 and I'll tell you why in a minute.

13 Devices to be submitted to NTEP. A device used in
14 a commercial application needs to be submitted to NTEP.
15 Devices which affect the measurement process, devices which
16 affect the validity of the transaction. Well, the scope of
17 NTEP is going to encompass those. All equipment that
18 affects the measurement process for the validity of the
19 transaction. For example, electronic cash registers
20 interfaced with the scale. That cash register becomes part
21 of that measurement. It may affect that measurement.

22 The service station console interfaced with the
23 retail motor fuel dispenser. That console becomes part of
24 that retail motor fuel dispenser, and can have an effect on
25 its performance. All equipment to the point of the first

1 indicated or recorded records of the final quantity in which
2 the transaction will be based. I always had a problem
3 trying to figure out what that meant so I'm going to give
4 you my rendition of what I think it means.

5 The first time you see the actual value or the
6 quantity being represented by a piece of equipment that
7 you're going to be charged for, based on that quantity, any
8 device attached to that memory element, prior to that first
9 indication, is subject to evaluation, because it can affect
10 the performance.

11 So, until we see that first -- once we see that
12 first indication of the quantity we're going to be charged
13 for, any device attached to after that point is not involved
14 in the NTEP process. I don't know if that helps you or
15 confuses, but it helps me try to understand it.

16 What's this all about? For compliance with NTEP,
17 NTEP issues a certificate of conformance to the manufacturer
18 for the model tested. This document is called a certificate
19 of conformance, and it's given to the manufacturer saying,
20 you conformed to the requirements in Handbook 44. The
21 certificate contains information about the device capacity,
22 the size and it's unique features.

23 While these certificates are being distributed to
24 the state weights and measures offices, they're published in
25 NCWM Publication 5, if the certificate was issued prior to

1 January 1 of 1998. And, if it's issued after that date,
2 it's now published on the NTEP home page at the address that
3 you see below here.

4 The certificate is a prerequisite for approval.
5 The NTEP certificate of performance is a prerequisite for
6 approval in 44 of the 50 states. Remember, I had
7 "voluntary" program in quotes? Well, in 44 states, it's not
8 a voluntary program. If you want to sell or use a piece of
9 equipment with a commercial application in 44 states, you've
10 got to have a certificate of conformance, if it's a
11 commercial piece of equipment.

12 The certificate provides the users and the
13 official the knowledge that the device manufacturer has the
14 ability to manufacture the device and the specifications and
15 the tolerances. I guess that basically ends my
16 presentation, so I'll ask if there are any questions? And,
17 if not, thank you very much. Any questions? David?

18 MR. QUINN: Steve, Dave Quinn with Fairbanks
19 Scale. Looking at the two systems that UPS showed us this
20 morning and your interpretation of the first representation
21 of the weights, does that mean that if I, as the, if I went
22 to get a package weighed and I could see the weight that's
23 on the scale itself, then that's as far as weights and
24 measures needs to go? They don't need to have any
25 computerized system there?

1 MR. MALONE: Well, I think you might be, I guess,
2 in my opinion, might be confusing this a little bit, because
3 when I talked about the first indication deals with the NTEP
4 process and what has to be submitted to NTEP for evaluation
5 of Handbook 44. That may be different than what a
6 jurisdiction requires as far as the certification of the
7 device.

8 So, I don't think we should tie it to that
9 limitation, either.

10 MS. BUTCHER: Tina Butcher, and yes, I agree with
11 Steve and I think there's one other element, even, in type
12 evaluation. Steve covered two and both of them must be met.
13 Not only do we evaluate the first point in the final
14 quantity, but we would also evaluate any equipment which has
15 any effect on the validity of the transaction.

16 Two examples that Steve used in his presentation
17 are a gas pump interfacing with a console. Well, in that
18 particular application, you can see the final quantity of
19 the gas pump, but the console is still within the type
20 evaluation of weights and measures regulation, because it's,
21 in effect, a validity of final transaction and may have
22 controlling features with respect to the authorization of
23 the device. Well, there really are two criteria, as Steve
24 pointed out.

25 MR. MALONE: Any other questions? Got off easy.

1 MR. COLEMAN: You did it a little under 30
2 minutes. You can be an instructor in training class I had
3 last Sunday afternoon. We could teach you all the classes
4 in a week, if we could just get Steve to teach them.
5 Thanks, Steve.

6 Now, I think we're going to have Daryl Tonini from
7 the Scale Manufacturers Association tell us what Steve
8 meant.

9 (Laughter.)

10 MR. COLEMAN: So, my trusty assistant will change
11 the projector.

12 (Pause.)

13 MR. TONINI: Well, whatever the outcome of our
14 efforts today, it won't be for lack of, I think, some very
15 radical duplication, I think, which hopefully will lead us
16 to a more complete understanding of some of the issues that
17 are involved.

18 I've been very interested to see how the fabric of
19 our tapestry has been woven here today, because so many of
20 the issues are coming at us from directions, perhaps, that
21 certainly we presenters had no idea of anticipating. The
22 Scale Manufacturers Association, in brief, is just what its
23 name implies. Its membership includes both domestic and
24 foreign scale manufacturing companies and components. That
25 includes both sales and instruments, and was founded in

1 1945, and which came out of another era of the industry
2 having to deal with Government regulation, and that was the
3 founding of the SMA back then.

4 What is SMA all about? Well, most of our
5 deliberative and technical energies are dedicated to the
6 National Conference. We carefully follow developing issues
7 in the process which Steve so easily outlined for us,
8 participate actively in the working groups and to the extent
9 which we are permitted by the rules of the game, and strive
10 to develop a membership consensus on proposals before the
11 committees. The committee which is the most important sort
12 here is the Specification and Tolerances Committee, and we
13 spend a lot of time following the proposals there.

14 No matter how obscure they may be, it's been our
15 experience that you overlook actions of the Conference at
16 your own peril. Why we are involved. From the earliest
17 founding days of the organization, we recognized that our
18 members' interests are best served by being a part of the
19 process, an active participant, rather than reacting to
20 actions of the National Conference. And, as we have
21 observed, these issues come and go, be it they polyethylene
22 thickness, a pine bark mulch, whatever it is, UPS -- many,
23 many issues that come before the conferences.

24 Generally, it's pretty tough when you're in a
25 reactionary mode in dealing with the conference. It's a lot

1 easier to be a part of the deliberation and it goes on as I
2 think Jim indicated, as this legislation had been developed,
3 if there had been more, perhaps more dialogue, we would have
4 a better product, and that's certainly been our experience.

5 And, that's why SMA spends so much of its effort in
6 following the activities of the conference.

7 I'm charged with talking about the system and
8 trying to pull some of the loose ends, I guess -- they're
9 not really loose ends, they were all addressed very
10 completely in their own context -- but to put the whole
11 system in a context. And, to do this, I will bring together
12 all of the various things that we've been talking about in a
13 schematic way, which hopefully would allow those who haven't
14 seen them before, at least, some idea of how these elements
15 interact with one another.

16 Jim, I think you made some comments this morning
17 about the initial verification or the purchase of the
18 device. I don't know, but I presume UPS would like to have
19 a device out in the marketplace. And, as a result, of
20 course, I detected a certain degree of confidence in the
21 system that, at least to the point where it was inspected,
22 you knew you bought a good product that was going to be put
23 in the marketplace, and hopefully any problems would be
24 discovered as we went along.

25 Well, let me shade that just a little bit. This

1 is a depiction of what all we've been talking about here
2 today is about. And, I'm not going to dwell at length upon
3 this, except to point out that the quarterback of the
4 system, as informal as it may appear to be, is a
5 verification office which basically is the function which is
6 served by the Office of Weights & Measures. They are the
7 distilling point for all of the information in the system as
8 it exists.

9 And, contributing to the subsystems, of course, is
10 first of all the pattern evaluation, the NTEP system which
11 Steve has just spoken to us about, the initial verification
12 subsystem, which he also addressed, and, I think, on
13 everyone's mind, is a subsequent verification subsystem,
14 which seems to be the issue of all of this, or a lot of
15 this, discussion here.

16 Steve has very well described to you the pattern
17 evaluation and subsystem, but there's something that needs
18 to be said at this point. As much as we would like to put a
19 lot of confidence in this process, it is very carefully
20 constructed, and we must be careful not to carry it too far.

21 As Steve pointed out, a manufacturer submits some version
22 of a new piece of equipment. It's evaluated in this one-
23 stop process that has been outlined to us and its features
24 are approved.

25 Now, this phase of the system, the subsystem is

1 not so much to provide measurement confidence, so be careful
2 about how far we want to take this NTEP certificate, that to
3 reduce the cost of later field inspections and to protect
4 the field inspection initial and subsequent verification
5 components of this from equipment which does not meet
6 Handbook 44 requirements. So, this is Filter A. And, it
7 really serves its purpose if it keeps out equipment which
8 obviously does not meet Handbook 44 requirements.

9 Based on that, you have a certain amount of
10 confidence that it's pretty good stuff, that it will meet
11 confidence. But, we should be careful in deciding just how
12 far we can carry that certificate into the process and say
13 we still have an accurate or correct device out in the
14 field.

15 This is another way of showing you what Steve
16 mentioned with regard to the NTEP adoption. I would comment
17 that those states colored blue or green have adopted the
18 National Type Evaluation Program. These are part of the 44
19 states that have been referred to. The State of Vermont is
20 planning to complete their adoption process sometime this
21 year. New Mexico, Gary, are we still on? Well, the figure
22 is still up. New Mexico very likely will do so this year.
23 Florida, in effect, is in the process and, by department
24 policy, requires new installations to be NTEP approved.

25 So, we're very quickly closing in on those

1 jurisdictions which are not part of the NTEP system.
2 Initial verification, which is the next time we see the
3 device, the manufacturer takes the certificate back to his
4 plant, gives it to his marketing and salespeople and off
5 they go, and the next, probably the next appearance of that
6 device is when one of our weights and measures colleagues
7 walk up to him and say, ah, hah, we have not seen this Model
8 X in the marketplace before. What do we do now?

9 Now, it is at this point that we have a very close
10 look at that piece of equipment and hopefully, even with
11 variations between departments' approaches to initial
12 verification, you had a pretty good idea of whether or not
13 the device is basically what it said it was going to be when
14 a certificate was issued.

15 A couple of other things that come into this,
16 though. We now have, and this is a difference which Steve
17 referred to between accurate and correct. Have the systems
18 been solved correctly? Have the user requirements been met?

19 And, this raises a rather interesting question. You can
20 ship all kinds of scales into the marketplace, that is, a
21 person who's unpacking, setting it up, complying with all
22 the requirements from the user's side that are necessary to
23 have that correct device.

24 I would also mention that the tolerances at the
25 initial verification stage are generally much tighter, half

1 of what you would normally expect to find when you test the
2 device in the field.

3 And, the last element of our system that we're
4 concerned with here today is the subsequent verification
5 subsystem, and this is the whole process which basically
6 takes the device from its first appearance in the field,
7 until it is retired from service. Now, a lot of things
8 happen to devices. New people come into the operation.
9 Their training levels may be different than they were, a
10 major remodeling of the work flow pattern and equipment is
11 moved around. There's a lot of value in the subsequent
12 verification subsystem and in the uniformity of that.

13 This, then, is the integrity which we're looking
14 for in that fair marketplace that we said is our goal.

15 Now, I tread into this next area of my
16 presentation with some trepidation and I just hope my
17 learned profession colleagues won't throw many stones at me
18 here. But, let's just say it's an engineer's view of
19 weights and measures and let it go at that. To make sure
20 you're all awake.

21 (Laughter.)

22 MR. TONINI: Not just the scale manufacturers but
23 the pump and meter manufacturers, as well, to name two other
24 equipment manufacturer's groups that we relate to the
25 conference with. Industry role in the regulatory process

1 has been one of working together toward a common goal,
2 rather than an adversarial one. Now, we found that we get a
3 lot more mileage, solve a lot more problems, and hopefully
4 have a better system, by being able to work together on
5 issues rather than seeing each other in Court or lawsuits
6 being filed and all that.

7 Industry is a major stakeholder in the integrity
8 of the commercial application. The equipment manufacturer
9 does not want his equipment to be tainted by its misuse or
10 misapplication, so we consider ourselves a major stakeholder
11 in this process. State and local jurisdiction, well, you've
12 heard about that. Here today, I would comment only that the
13 jurisdiction role is probably more uniform than it would
14 initially appear. Somewhere way back in engineering school,
15 I remember being introduced to the principle of the central
16 limit theorem, which says no matter what your population is,
17 if you get it big enough, it's going to have the normal
18 distribution.

19 And, I kind of have a gut feeling that despite the
20 variations that we seek from jurisdiction to jurisdiction,
21 that by and large, that center point of our weights and
22 measures system does provide equity in the marketplace.
23 And, sometimes we kind of sound apologetic about the U.S.
24 weights and measures system.

25 Daryl Tonini's view is, we have nothing to be

1 apologetic for, when you consider what we are attempting to
2 control and how well we do it. I think you should also be
3 of note, and I think this has been referred to also today,
4 is how the weights and measures programs are funded. Some
5 are from a general fund and they are driven just by
6 justifying their operation to their Executive Branch and
7 they are then funded out of general funds.

8 Others are funded by licensing fees, inspection
9 fees. Some jurisdictions also crank into their budgets any
10 fines or penalties which they may receive. But those
11 differences, by and large, in my view, at least, do not lead
12 to any gross distortions, except to recognize that some
13 jurisdictions are probably, and we saw this on another
14 slide, I guess, was it your slide this morning, Gil, or
15 Aves, where we saw this distribution of how weights and
16 measures programs are funded. Taking that into
17 consideration, you say, wow, maybe it's not too bad.

18 And, I think it would be okay for me to say that
19 it's safe to observe that most weights and measures
20 jurisdictions are not looking for more work for work's sake.

21 Their platters are very full in dealing with issues which
22 really affect a broad percentage of population in the
23 marketplace, so as we worked with weights and measures,
24 we've come to appreciate, and it's important to recognize,
25 that they are not capricious in their interest. They're

1 really trying to do a good job.

2 Federal grants, and we heard a whole lot of that
3 from our learned counsels here today, and I would just offer
4 the following observations -- it's been happening for a long
5 time, and it's probably going to continue to happen.

6 (Laughter.)

7 MR. TONINI: But, as an interested observer, I
8 would note that it seems to be pretty well consistent with
9 our counsel's reading of the law that, as we've seen this
10 occur that affects weights and measures, it seems to be one
11 of three categories. It's either accompanied by a
12 department or agency regulatory structure, or some form of
13 shared responsibility between weights and measures and the
14 regulatory authority, or some combination of the two, and I
15 would just rather quickly -- the Grain Inspection of the
16 Packers and Stockyards Administration both started as pre-
17 emption efforts on behalf of the Federal Government to
18 correct problems. There were weights and measures problems
19 out there, which were not being addressed in a uniform
20 manner by the states, so we had grain inspection, we have
21 packers and stockyards, and as they started out, they had
22 their own regulatory arms, their own inspectors, their own
23 approval. I mean, everything was involved with that.

24 We also have the Interstate Commerce Commission,
25 which I put up here just to illustrate in my view, anyway, a

1 rather interesting situation. It seemed, as I tried to read
2 between the lines of that ruling, I think I see ICC was
3 saying, yeah, we have pre-emptive authority, but we don't
4 have an inspection system, so they were very comfortable to
5 allow weights and measures to continue that. A layman's
6 view on how that worked out, but it's an example of how, in
7 these pre-emptive cases, where we have, in effect, learned
8 to work together and to live together, both in the Grain
9 Inspection, Packers, Stockyards and with the Yellow Freight
10 really at the time, it was of importance.

11 I'll put this slide up, just, I guess, to
12 underscore the fact that certainly the Department of
13 Agriculture, they spend a lot of dollars even today on grain
14 inspection and packers and stockyard. I tried to put their
15 backs to the wall and say, tell me how much, and
16 surprisingly, no one can tell me how much. I was told that
17 Jim's administration downtown is budgeted for \$670,000
18 fiscal year '99. Enforcement, no one has any idea, but it's
19 a lot of money. There are a lot of people with fee losses
20 around the country, and I guess USDA Kansas City's operation
21 with respect to grain is budgeted something like \$5 million
22 a year.

23 So, at least in these cases, where the intent of
24 Congress was to pre-empt regulatory authority, they also
25 seem to be willing to put some dollars into that.

1 The issues before us is, as we see it, are
2 philosophical and we heard today, they're really three
3 issues and not one. Storefront operations, there seems to
4 be some consensus about NTEP shaping up here, as to the
5 desirability of inspecting their backroom shipping scale
6 operations. And, I think we're within striking distance
7 there.

8 Sorting and shipping centers, we haven't said an
9 awful lot about that. I'm surprised that that hasn't -- I
10 don't want to open Pandora's Box here, but I think there are
11 some interesting challenges if you go into calibrating
12 dimensional lane systems and all. If you get too far back
13 in the systems, I'm not sure we have all the tools we need,
14 the enforcement tools we need to determine accuracy of
15 those. I would stand to be corrected on that, if anyone
16 would care to do that.

17 There are some issues before us. I think to the
18 extent that jurisdictions depend on licensing and inspection
19 fees, one might argue that there could be rightful issues,
20 if that was the only point that we were talking about. And,
21 we're also talking about the same local jurisdiction assets
22 and the priorities which we've referred to many times. Do
23 we have bigger problems on our hands, and then in the
24 shipping room or the distribution center weights and
25 measures devices.

1 I pose the question to you, if not weights and
2 measures, who? I've spoken to others that are in the room.

3 I do not share all the concerns of UPS, but let's not
4 overlook the role of the third man. We've had reference to
5 a Milk Study that I think we've observed this process over
6 the year and we've seen a fair number of PR debacles which
7 have come about because some part of the system was working
8 outside of weights and measures. Scanners, catsup, milk,
9 who else knows what else. That was just on my short list.

10 Our recommendation would be that as we go forward
11 from this dialogue, that we continue to do so within the
12 system and not in an adversarial way. We'll get a lot more
13 accomplished there. Where needed, we may need to work
14 together to develop some field inspection methodologies,
15 some of these technologies that are coming into the
16 marketplace. Some of the users may have to work with the --
17 these appear to be owners, although our colleagues in DOT
18 didn't view them as such. Came out to about 10,000 devices
19 out there, it's more than petty cash that you're talking
20 about.

21 But, there are other ways to fund purpose, and I
22 would suggest the users consider their representation of the
23 state legislative groups. If you think it's broken, talk to
24 your weights and measures division and see how you can
25 support them in bringing about a more efficient way of doing

1 business.

2 And, last, it is certainly our experience that you
3 use the conference process. We think it's served our
4 industry very well. It served our sister association well,
5 also, and we are firmly convinced that this is the way to go
6 about it. So, if you'll forgive a pun, are there any
7 questions?

8 MR. COTSORADIS: Just one comment that's upon your
9 last thing about using the National Conference process to
10 their advantage. I was president during the ICC hearing and
11 that's exactly what the Commissioner said, with the system
12 in place -- it's called the National Conference of Weights
13 and Measures, Yellow Freight, that's your forum to address
14 these concerns. Use it.

15 MR. TONINI: It all worked out very well, once we
16 got beyond the point of swearing off -- . If there are no
17 other questions, Tom, I'll turn it back to you.

18 MR. COLEMAN: Thank you, Daryl. That brings us to
19 an interesting point in today's workshop. I started this
20 morning by talking about what I thought would happen today
21 and I mentioned things like I thought it would be
22 educational and interesting and informative, and this has
23 been all that. There were things that you expect to hear.
24 We talked about equity, we talked about subsections, we
25 talked about priorities. We heard a couple of lawyer jokes,

1 we heard a poem. We even heard a rooster -- I think it was
2 a rooster. Was that a rooster, Daryl? If I'd have said a
3 chicken, I'd have never lived it down.

4 But then, my all time favorite was, we heard about
5 "Federal Pre-emption Happens", and I think you do have a
6 real possibility for a bumper sticker. That's a good idea.

7 Now, one of the things that I talked to you about,
8 that I tried to emphasize, and I hope that it didn't come to
9 blows today, and it didn't, it was fine, that I said we have
10 reasonable people, and we do. We have intelligent people,
11 we have people that care. We have people that are looking
12 for a solution, which is what it takes to find the solution.

13 So, that brings us to the point after our break where we
14 either do or don't, forever, say what we have on our minds.

15 So, we're going to open it up for a few minutes to
16 all the people in the room that wanted to say something that
17 didn't, that wanted to comment on something that didn't,
18 that need an explanation and didn't get it. So, there will
19 be a period of time after the break where you need to go
20 back and load up, because if you don't say it now, then
21 there's no point in ever saying it. This is the one time
22 that you are to say it that it will be in front of the
23 people that need to hear it. And, something can happen,
24 something better.

25 So, when we come back -- we'll take a break. Say,

1 it's 2:30, maybe 3:00. We're way ahead of schedule, or you
2 don't want to take that long a break? Debbie wants to take
3 that long a break? Fifteen minutes, 20 minutes? Fifteen
4 minutes?

5 So, again, this is the time where you're on the
6 stage, so at a quarter till, we'll be back and we'll give
7 you the opportunity.

8 (Whereupon, a short recess was taken.)

9 MR. COLEMAN: Okay, after the break, that brings
10 us to what I alluded to just before the break. Everyone
11 will have an opportunity to voice their concerns, their
12 opinions, then we're going to ask them some very pointed
13 questions. It's sort of the end of the day, Mr. Moriarty,
14 people at the UPS, as to where do you think we are now,
15 where do you think we need to go.

16 Anybody have any comments, concerns, questions?

17 Yes, ma'am?

18 MS. DEMPSEY: I just have one concern is that
19 earlier in the day --

20 MR. COLEMAN: Let's see if we can find him. I
21 think he's here. Let me find him.

22 (Pause.)

23 MR. COLEMAN: Here he is.

24 MS. DEMPSEY: Okay, one of the concerns that we
25 have encountered in Montgomery County is, when we're in the

1 retail stores that have UPS scales, we're told that we have
2 no authority over those scales in the retail outlets, to the
3 point where we will go ahead and check them and then they
4 ignore us until we have to go back.

5 So, our concern is, after hearing the
6 conversations today, that retail is different than counter
7 service or the back room, to me, it sounds like there's no
8 difference with what UPS does out in the field.

9 MR. MORIARTY: Okay, if by retail, you mean like
10 the Mail Box --

11 MS. DEMPSEY: Parcel Post, Mail Box --

12 MR. MORIARTY: -- it has never been our position
13 that those are pre-empted.

14 MS. DEMPSEY: But, they are being told by their
15 UPS representative.

16 MR. MORIARTY: If we could deal directly on that
17 and specifically, as to who is saying what and what company?

18 MS. DEMPSEY: We can.

19 MR. MORIARTY: Can we do that?

20 MS. DEMPSEY: Yes.

21 MR. MORIARTY: Okay.

22 MR. COLEMAN: But, I don't think that's an
23 isolated case, is it? I think other people are finding the
24 same problem. So, education as far as UPS and weights and
25 measures officials is one thing. We can correct that

1 situation.

2 MR. MORIARTY: I think that's something we should
3 do.

4 MR. CARROLL: I think I have a letter on file in
5 my office from UPS saying they didn't want us interfering.

6 MALE VOICE: Could you repeat that?

7 MR. COLEMAN: Oh, Charlie said that there was a
8 letter on file, on record, in his office that UPS requested
9 none of his inspectors enter any of their establishments.
10 Is that fair, Charlie, as to what you said?

11 MR. MORIARTY: If you could send us a copy of
12 that?

13 MR. CARROLL: That's one case where we could use a
14 contact person at UPS, because I think this happens more
15 than you're aware of.

16 MR. COLEMAN: That could be us, it could the
17 Office of Weights & Measures.

18 MR. MORIARTY: Maybe it should be Tom. Everybody
19 send your problems to Tom. He's looking for another --

20 MR. COLEMAN: I'm just trying to make it to the
21 end of the day. Send all your requests to Tom, that's a
22 good solution. That's fine, that would be fine.

23 MR. HUBERT: No disrespect to you, Tom, but could
24 it be a different person, because that's more a regulatory
25 response and that person should be between the jurisdiction

1 and us, whoever or whatever business it is.

2 MR. COLEMAN: Well, I see your point, but I sort
3 of disagree with that. I could maybe take some of the sting
4 out of that by talking directly with Jim and if there's
5 enough information to provide to him, maybe we can do
6 something on a national level, instead of one jurisdiction
7 addressing it individually.

8 But, it certainly doesn't prohibit you from doing
9 that. If you would rather deal with it in that manner,
10 Office of Weights & Measures would not have a problem with
11 that.

12 MR. UGIANSKY: But, if you're doing that, it might
13 be a good idea to copy Tom, so he's aware of what all is
14 going on out there.

15 MR. HUBERT: I didn't say I was going to do that.
16 I posed the question.

17 MR. WEST: Can I speak next?

18 MR. COLEMAN: Sure.

19 MR. WEST: I guess the only thing I'm concerned
20 about is, I listened to a lot of discussion today, as
21 everybody else has. I really need to hear from UPS, we're
22 really hearing what the real problem is.

23 MR. COLEMAN: Well, that was at 3:45, our first
24 really nasty question.

25 MR. WEST: I can't fix it if I don't know what's

1 broken. I'm not saying I can fix it at all, but that
2 encompasses what Daryl alluded to, in which, if we learned
3 what is really the problem, that's fine. But, if it's
4 something underlying that we haven't heard, we need to hear
5 it.

6 MR. COLEMAN: I do plan on addressing that. I
7 think my first question of Jim will be where are we right
8 now? What do we need to do to fix this to make it some
9 reasonable solution for everyone, and I think he's the one
10 that can give us those answers. And, I think he, quite
11 frankly, heard a lot of things today that he hadn't heard
12 before. I hope I'm not speaking out of place, but I don't
13 think that as a representative of United Parcel -- and, you
14 could sort of see the hair on the back of his neck when
15 Constantine compared him to Attila the Hun.

16 (Laughter.)

17 MR. COLEMAN: And, obviously, he has a lot of
18 faith and a lot of confidence and a lot of respect for the
19 people he works with at UPS. And, I don't think he realizes
20 there are letters being sent to regulatory people saying, I
21 don't want you in my store for any reason or any purpose.

22 So, there's a lot of things that, if we can
23 provide information to him, that maybe everything is not
24 quite as black and white as we thought. There's a mutual
25 ground that we can find some reasonable solution. So, I

1 think we made a lot of progress today.

2 Anything else, any other? Again, this is the
3 opportunity for the states and local jurisdictions to, all
4 the appropriate people are sitting here, so it's now or
5 never. Is there anything that we've overlooked? Is there
6 any area of this -- who said that, Gary West? You said
7 that, Gary? Wes is making you say things again.

8 MR. WEST: No, I was asking Wes if he got an
9 answer to his question.

10 MR. COLEMAN: I try to dance around Wes' questions
11 most of the time. We're going to get to that, Wes. Don't
12 get anxious. Okay, is that it? We did such a great job
13 today -- they did such a great job today that we don't have
14 any questions. Uh, oh. Yes, sir?

15 MALE VOICE: Well, I think we're at an impasse at
16 this point. We have UPS refusing to admit that they have a
17 commercial device.

18 MR. COLEMAN: Can you see the hair on his neck?

19 MALE VOICE: And, you have the state saying
20 they're all commercial devices.

21 MR. COLEMAN: Well, I think that may be true to
22 some extent, but I think there is some common ground and I
23 think Otto recognized it earlier in the day and I think a
24 lot of people have said it, and I think Jim has said it,
25 that there are a lot of things that they don't have a

1 problem with inspection, as far as individuals testing their
2 scales.

3 There are some cases like Charlie said, where
4 maybe that's not the case, but it might not be the policy of
5 UPS. So, what I think we need to do, if there aren't any
6 more real concerns, is we asked Jim, where are we in this
7 process? What is your opinion of what happened today and
8 where do we go from here to solve some things without going
9 to Court and without causing that type of action, which is,
10 I think what everybody wants to do, is find the common
11 ground that we can all live with.

12 So, is there anything else? Yes?

13 MR. MALONE: Steve Malone from Nebraska. Just to
14 bring up one situation that I have with one of UPS'
15 customers using the Maxiship system. They are taking that
16 quantity from that system and placing it on an invoice with
17 the quantity, and billing their customer directly for that
18 shipping service, based on the weight on the invoice. In my
19 jurisdiction, I consider that absolutely a commercial
20 transaction, and that device will be registered, inspected
21 and regulated by us.

22 And, UPS has basically indicated to the customer
23 that we have no authority over it. So, I think maybe we
24 need to have that particular opponent in the equation,
25 because we haven't really discussed that situation, where

1 the customer is taking and using that quantity for their own
2 representation.

3 MR. COLEMAN: Thanks, Steve. I think that's the
4 case pretty well across the country. Is it time to ask Jim
5 that question? You want to ask it, Wes? Okay.

6 MR. MORIARTY: I would like to say first of all
7 that we have learned a lot today, and a lot of what we've
8 learned, I need to convey back to the folks and to talk
9 about it and to discuss it. You know, I learned about the
10 manufacturer certification, the initial certification that
11 Daryl had talked about, and then the initial and subsequent
12 certifications.

13 Also, that when these things, the scales come from
14 Louisville and are flown out, that may impact once they get
15 there. We have our own, you know, technical people
16 installing these things, these scales, but maybe we need to
17 look at what happens when it's flown in from Louisville.

18 What I would like to do is work with Gil and Mike
19 and Tom and everybody here to see if there's a certain list
20 of things that we can all agree to. I don't know whether
21 you send us that list, which may be better than us sending
22 you the list, and work within this conference and within
23 this community to address these concerns. Again, we are not
24 -- I think some of what's happened over the last three years
25 or so has just been, you know, somebody said something to

1 somebody to somebody, and then it just kind of got way out
2 of control, when our core position is that we're not dealing
3 with every scale that's used to give packages to UPS, but
4 with these services, Online Professional services that we
5 provide.

6 So, if we can come up with that list and agree to
7 it together, then I think we will have accomplished a great
8 deal. Thank you.

9 MR. THOMPSON: Tom, I may sound like I'm selling
10 memberships here to the National Conference on Weights and
11 Measures and I probably am. But, some of our associate
12 members have found that in the long term, their membership
13 and regular participation in the National Conference on
14 Weights and Measures pays off enormously.

15 We have before us a problem that needs to be
16 solved. Maybe a year from now or two years from now,
17 there's something else that will come along. Just, on
18 behalf of the National Conference, I extend to you and your
19 company a warm welcome to join our National Conference,
20 participate in our activities, help us develop solutions, so
21 that we don't have to resort to solving our problems in
22 Court.

23 Let's do them at the planning table ahead of time,
24 and then it will work better for all of us. Thank you for
25 coming today, thank you for participating and we look

1 forward to working with you.

2 MR. MORIARTY: Thank you very much. I would like
3 to get information on joining the Conference. I do think
4 that's a very good point. You know, this is an important
5 group, it's a national group, it is working on issues
6 important to the company. We would rather be on the front
7 end than on the back end, and maybe that's something we can
8 put on our list, about working, becoming a member and being
9 part of the conference. Thank you.

10 MR. COLEMAN: Anything else? Nothing else. I
11 think the boss is about to speak.

12 MR. UGIANSKY: I just want to agree, you know,
13 with Jim that it's a great idea for you to become a member
14 of the conference. I know there are UPS people that
15 participate in some of the working groups of NTEP
16 committees. And, what I was going to say -- I forgot what I
17 was going to say.

18 Oh, what I was going to say was that we have an
19 opinion from the DOT and that's probably something that the
20 conference is going to look at, and it's not on the agenda,
21 so it probably can't be voted on this July, etc., but it's
22 probably something that the conference is going to look at,
23 having a formal view of the conference to vote on and say,
24 this is the conference position on this issue. Now that we
25 have DOT's position, it's something the conference probably

1 ought to look at, you know, but the conference leadership
2 will decide that.

3 But, I'm sure you want to be there and be able to
4 present your side when and if that comes about. It probably
5 would help to have a conference view or position on this
6 whole issue, now that we have the DOT position. Thanks.
7 And, maybe if we're going to end soon, I'll just right now
8 thank everybody for participating. All the speakers
9 especially, and especially UPS for coming and for DOT coming
10 and giving their views on this issue and all the other
11 speakers, really.

12 I think it's been a really useful workshop and
13 hopefully, we will get to a resolution before too long.

14 MR. COLEMAN: Thank you. I guess just a couple
15 more things. I think I can make available to anyone that
16 would like a copy of any presentation, if you'll let me
17 know, I think I can see that you get copies. Some of you
18 especially wanted Jim and Steve's, whatever you want, if
19 you'll just get in touch with me or put it on a business
20 card, write on the back what you want, I'll be glad to see
21 that you get that in a reasonable period of time. And,
22 again, I'd like to thank everyone.

23 Not knowing how this was going to go today and
24 what direction we were going and sort of walking into it
25 blind, I think it turned out very well. I think it was a

1 benefit to everyone here. I think it was of particular
2 benefit to industry and the conference to let each other
3 know what they really think and what they really do and how
4 they can help each other. And, I think the Aves' point of
5 joining the conference is maybe the key to the whole thing.

6 I don't think we had a weights and measures
7 official here today say that they didn't think they had
8 jurisdiction over the scales that are used to meet the
9 definition of a commercial device. I don't think anyone
10 ever said that. I think probably that's maybe where we need
11 to set those priorities and decide what we really want to do
12 nationwide, so that UPS and everyone that does business like
13 that has an idea of what to expect from everyone. And, then
14 we turn it into equity and uniformity and all the
15 appropriate things that we talk about.

16 So, again, I do appreciate everyone's
17 participation today. If there's anything our office can do
18 as far as providing details of this meeting, we will have a
19 transcript in ten days. Maybe you would like that. I don't
20 know why we couldn't make that available.

21 MR. UGIANSKY: Just one more thing. I have some
22 cards from people that want the presentations, but I made
23 some notes here to see if we can't get all presentations put
24 on our web site, and if I could get the electronic version
25 of your presentations, whatever, and Jim, if I could get an

1 electronic version of the team, we'll put all of it up on
2 the website so that you can get it there, and maybe they can
3 download the presentations if they want them.

4 But, I know that stuff can be done. It's a matter
5 of whether or not we have the resources, and we'll put the
6 transcript up, too, if we can.

7 MR. COLEMAN: Thanks, Gil. I guess that's about
8 it. One other thing. We have a 15-passenger van that we
9 tried to provide transportation to the Washingtonian, the
10 Marriott, the Rio, and if anyone would like a ride -- I
11 don't know how many people are staying there, but we thought
12 quite a few might be, so we've got a 15-passenger van.
13 We'll be glad to give you a ride back to the hotel and pick
14 you up in the morning, if that's something that you want
15 done.

16 Dennis wants us to pick him up in California and
17 bring him here.

18 FEMALE VOICE: Can you pick me up at Bethesda?

19 MR. COLEMAN: I'll pick you up at Bethesda. You
20 just stand out by the porch.

21 (Laughter.)

22 MR. COLEMAN: I will be there in the morning,
23 cause Tina's going to run tomorrow's meeting, and I will
24 come over at 8:15 to the Marriott Rio with the van if you'd
25 like a ride. And, if there's enough that need a second

1 trip, I'll be glad to do that. So, again, I thank everyone
2 for their participation. We put the right group together at
3 the right time, and I hope -- I'm sure in the long run,
4 things will be much better. Thank you very much.

5 (Whereupon, at 3:15 p.m., the hearing was
6 concluded.)

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